STATE OF MICHIGAN
IN THE SUPREME COURT

46th CIRCUIT TRIAL COURT,

Plaintiff Counter-Defendant
Third-Party Defendant-Counter-
Plaintiff-Appellee

v.

Supreme Court No. 128878
COA No. 254179
Crawford Circuit Court No. 02-5951-CZ

CRAWFORD COUNTY and CRAWFORD COUNTY BOARD OF COMMISSIONERS,

Defendants Counter-Plaintiffs
Third-Party Plaintiffs-Appellants

and

OTSEGO COUNTY,

Third-Party Defendant-Appellee

and

KALKASKA COUNTY,

Intervening Defendant-Counter-
Plaintiff-Third Party Plaintiff-
Appellant

BRIEF ON APPEAL – APPELLEES

ORAL ARGUMENT REQUESTED

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Appellees 46th Circuit Trial Court and Otsego County answer, "Yes."

ISSUE II WITH RESPECT TO THE DISPUTE OVER PENSION AND HEALTH CARE BENEFITS, DOES THE RECORD EVIDENCE ADEQUATELY SUPPORT THE TRIAL JUDGE'S CONCLUSION THAT THESE BENEFITS WERE REASONABLE AND NECESSARY TO ACHIEVE THE COURT'S CONSTITUTIONAL AND STATUTORY RESPONSIBILITIES BECAUSE UNDER THE CIRCUMSTANCES OF THIS CASE DEPRIVING THE COURT'S EMPLOYEES OF THOSE BENEFITS WOULD HAVE AFFECTED EMPLOYEE MORALE TO AN EXTENT THAT WOULD HAVE PREVENTED THE COURT'S SATISFACTORY FULFILLMENT OF THOSE RESPONSIBILITIES?

Appellees 46th Circuit Trial Court and Otsego County answer, "Yes."

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Appellees 46th Circuit Trial Court and Otsego County answer, "Yes."

APPELLEES' STATEMENT CONCERNING APPELLANTS' METHODOLOGY AND APPROACH TO THE SCOPE OF THIS APPEAL

Appellants Crawford and Kalkaska Counties have either misunderstood, or chosen to disregard, the very specific directives this Court gave in its December 28, 2005 Order granting limited leave to appeal. This Court did not say that it wished to re-examine the trial judge's findings regarding credibility and historical facts de novo, or that it was suspending the usual rules of appellate practice for this singular case. Rather, this Court directed the parties to identify and comment on the evidence supporting the conclusions reached by the trial judge with respect to (1) the constitutional adequacy of overall funding, (2) whether the two specific employee benefits were reasonable and necessary, and (3) the existence of a contract between the 46th Circuit Trial Court and Crawford County ("Crawford") and/or Kalkaska County ("Kalkaska") to fund pension and health care benefits at a specific level.[1]

It appears, however, that Appellants have read this Court's order as an invitation to ignore the many detailed findings made by Judge Kolenda in his role as the trier of fact. For instance, Appellants once again proffer as gospel the opinion testimony of their expert, Fred Todd, and the self-serving testimony of certain commissioners about what they intended when passing resolutions. But the trial judge, after observing all witnesses testify, concluded:

> This Court found the Trial Court's witnesses to be credible and persuasive. They gave testimony which reflected careful and thoughtful assessments of the pertinent facts. Crawford County's expert was a witness who rationalized a pre-ordained opinion. He was ignorant of many pertinent facts and his assessments were shallow. Furthermore, much of his testimony was evasive, betraying a realization that he could not sustain his conclusions. Crawford County's controller was not dishonest, but he could not articulate any persuasive bases for the conclusory positions he

[1] In this brief, Appellant 46th Circuit Trial Court is referred to as "the Trial Court," or sometimes "the Court." To promote clarity, the circuit court is identified as "the trial judge" or "Judge Kolenda."

> took. The several county commissioners who testified were not helpful. They testified only to what they have convinced themselves, or have been convinced, happened and was intended. (38 a.)

As Appellees 46th Circuit Trial Court and Otsego County ("Otsego") will explain, Appellants' overstatement of the role of de novo review in this case is simply wrong.

Appellees do not intend to approach this record as if they were arguing to a de novo fact finder, as Appellants have done. Appellees will, of course, develop the evidentiary support for the propositions identified in the order granting leave to appeal. But exceedingly detailed factual findings of the trial judge should not and cannot be disregarded.

Further, at many turns Appellants recast the record in a selective, skewed and sometimes plain dishonest fashion. Appellees will point out those misrepresentations as necessary, but will not stoop to rebut each one. In a word, the true picture of this case is very different from the one Appellants have tried to paint.

Because it better serves the logical progression of Appellees' argument, after addressing Issue 1 (insufficiency of overall funding), Appellees will then address Issue 3 (existence of the "contract") before Issue 2 (whether two specific benefits were "reasonable and necessary"). Appellees – the 46th Circuit Trial Court and Otsego County, its control unit – speak with one voice on all issues before this Court.

INTRODUCTION

Trial court funding in Michigan is, even in the best of circumstances, a delicate enterprise that potentially pits a local legislative body's responsibility for the prudent expenditure of public funds against the constitutional duty of a court to exist and carry out its specified functions. The legislative body must support the court's existence and functioning, even as it funds other essential services that it provides to its constituents.

This already complex setting became vastly more complicated when this Court created the 46th Circuit Trial Court – an amalgamation of six previously separate courts that would be funded by three independent governmental entities – the Counties of Otsego, Crawford and Kalkaska. Pursuant to this Court's directives,[2] the three counties embarked on what is essentially a partnership with the unified court. This Court envisioned a merged court system that more efficiently utilized judges and court personnel to serve the public in the three counties at lower cost (657b) – eventually through a single budget cooperatively funded, in accordance with an internally determined formula, by the three county partners. (345-347b.) As in any partnership, this arrangement required the partners to make periodic contributions that are a matter of obligation to their fellow partners – the other counties, who must rely on each county's diligent participation to make the partnership work, as well as the court itself.[3]

None of the three counties has ever suggested that it would like to withdraw from this partnership. It is undisputed that the unified Court has benefited, and continues to benefit, the communities it serves. See discussion at 22-24, infra. Yet, instead of recognizing this principle of partnership, in 2002 Crawford and Kalkaska acted unilaterally in a manner that would have destroyed the partnership, but for this litigation.

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[2] The 46th Circuit Trial Court was created by Administrative Order 1996-9 and continued by Administrative Order 1997-12. In furtherance of this plan, the Legislature soon adjusted the geographic boundaries of the 87th District Court and the 83rd District Court so that the boundaries of the unified court matched those of the three funding units. See 2000 PA 38, MCL 600.8152(2); 2002 PA 92, MCL 600.8148. In addition, the Legislature created for Crawford and Kalkaska Counties two of a handful of unified probate/district judgeships in the state. MCL 600. 810a. The Court continues to function as a unified entity today under Concurrent Jurisdiction Plan UTC 06-2006-01.

[3] Scott Hanson, a Crawford Commissioner who chaired either the County's judiciary committee or the entire Commission for much of the relevant period, described the arrangement as a "partnership of counties towards funding the court." (898b.)

In responding to this Court's first directive, i.e. that the parties address the constitutional sufficiency of the overall level of funding of the 46th Circuit Trial Court, Appellants offer an account of what precipitated this litigation that is simply false. The dispute flared into litigation only after Crawford unilaterally slashed the Court's 2003 funding to an extent that, if the other funding units followed suit, would have meant a reduction of $609,958 or 19.4% of the Court's operating budget.[4] (52a; 1132-1133b.) This was done unilaterally, without any consultation with the Court or other funding units, on the notion that the Court was a county department and would simply have to live with whatever cuts Crawford decreed, as other county "departments" did. This sweeping budget reduction had no direct relationship to the two disputed employee benefits.

There cannot be any dispute that this drastically slashed overall funding for 2003 was insufficient. The litigants and Judge Kolenda recognized that the court would run out of funds and be forced to shut down in the summer of 2003 unless Judge Kolenda ordered increased funding. (743b, 800-802b, 1024-1031b.) Ignoring the trial judge's specific findings, the testimony of its own witnesses, and unambiguous exhibits, Crawford nevertheless claimed in the Court of Appeals and in its Application for Leave to Appeal that it had in fact increased the Trial Court's funding for 2003 over 2002.[5] But the purported increase to which Crawford points included the cost of new full-time judgeships (for which the funding units would be fully reimbursed by the state) and an increase in Crawford's percentage share of the overall budget from 24% to 27%, which Crawford agreed with the other funding units to assume. As part of the same adjustment, Kalkaska's percentage share of the Court's budget was reduced from 32% to

[4] This was set forth in the Complaint filed by the Court on November 19, 2002 (148-149a). Kalkaska followed suit in December 2002. Crawford's actions forced Otsego to decline to set a budget that the other funding units would ignore.

[5] See Appellants' Application for Leave to Appeal, Docket No. 128878, p 4.

28%. That change yielded a reduction of $125,892 in Kalkaska's share of the 2003 funding from what would have been expected under the 2001-2002 sharing formula.[6]

Having gained this Court's attention with their misstatement, Appellants now virtually abandon their argument on the overall funding controversy. They dedicate a scant two pages to "developing" that argument, and their artful presentation leaves the impression that all that is involved is, again, the two employee benefits. (Appellants' Brief ("Brief"), pp. 5, 24-25.)

As time has passed since Judge Kolenda's July 25, 2003 ruling, overall funding has ceased to be an issue. Salary increases and other personnel costs for the Court's 2005 and 2006 budgets have been agreed to in cooperative discussions between the Court and commissioners of all three counties. The Court and the counties are dealing cooperatively with contingencies as they arise. But there can be no question that the court was fighting for its very existence when this case was tried in 2003, given that the unilateral cuts made by Crawford and then mimicked by Kalkaska had gutted its 2003 funding and would have forced it to shut down later that summer.

Turning to the third issue identified by this Court (and passing over the second for the moment), Appellants claim first that no contract could have been entered into as a matter of law, and second that none was entered into as a matter of fact. But this Court provided a mechanism to guide the parties in multi-funding unit settings, in order that they might enter into precisely such multi-year funding agreements. In Administrative Order 1998-5 ("AO 1998-5"), section II, the Court specified that a chief judge may "enter into a multi-year commitment concerning any personnel economic issue" as long as the funding unit agrees, or the resulting agreement is

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[6] The figure shown is 4% of the Court's request of $3,147,304. Not only was the amount expected from Kalkaska reduced in this fashion, but Kalkaska reduced its 2003 appropriation for the Trial Court by an additional $170, 657 from what the Trial Court requested. (1133b; 1230b.)

consistent with what the funding unit provides to its employees. Section IV of AO 1998-5 recognized that funding units like the Counties would be required to fund the cost of permissible multi-year agreements as long as they had been given the opportunity to participate in the process of setting employee compensation.

Pursuant to this Court's guidance, hundreds of multi-year agreements have been entered into between Michigan courts and their employees (typically in the collective bargaining setting), binding the legislative bodies to fund them; most of these agreements include provisions for pension benefits, and some for retiree health care benefits. In fact, if the Trial Court's employees had organized – as they almost did in 1999 – the court and its employees would have negotiated a collective bargaining agreement, and the dispute over the two benefits would never have arisen. Or would it? [7]

The two now disputed benefits in fact resulted from a commitment made by the 46th Circuit Trial Court to its employees, with the full knowledge and approval of the funding units as contemplated by AO 1998-5.

The record is clear that in 2000 the Chief Judge of the 46th Circuit Trial Court dealt collectively with the Court's employees over wages and fringe benefits. He told them that he would approach the three Counties with a proposal calling for specified retiree health care and pension benefits – benefits already possessed by some of the three Counties' employees – if the Court's employees agreed in return to give up certain of their current benefits – a favorable traditional health care plan and their traditional year-end longevity pay – and to devote part of an

[7] For at least twenty years, the district court staff in Crawford County, currently consisting of three employees, has been represented by AFSCME. In 2004 the funding units participated in negotiating a collective bargaining agreement with these employees that extended to them the benefits that are the subject of this litigation, including granting them both a MERS B-4 benefit and access to the retiree health fund. See Attachment 1.

annual wage increase for the next three years to help fund a newly created retiree health care fund.

There is also no question that: (1) this proposal was fully explained to representatives of the three County Boards during tri-county meetings held during May-August 2000 for the purpose of planning the Court's 2001 budget and cementing a coordinated partnership among the Counties and the Court;[8] (2) each County's representatives agreed; and (3) each County thereafter passed some form of resolution approving the benefits (though AO 1998-5 makes no mention of requiring such resolutions).

Appellants barely mention AO 1998-5 in their Brief. It is apparent, however, that they believe this Court acted unconstitutionally in promulgating an order that even contemplates the possibility of multi-year agreements between courts and their funding units.[9] Appellees defer to this Court's judgment that it acted properly in framing AO 1998-5, under which courts and local governmental entities have now been operating for over seven years, often making multi-year contractual commitments in the process. [10]

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[8] With respect to the Court's meetings with its employees, Judge Kolenda said:

> While there is no basis in the record before this Court to conclude that any representatives of Otsego, Crawford and/or Kalkaska Counties attended and participated in negotiating sessions with Trial Court employees over wages and benefits, there is also no evidence that anyone from those entities ever expressed any interest in attending any such sessions. Therefore, there is no basis for concluding that the administrative order's condition for giving permission to attend was ever triggered, precluding any violation of the condition. Furthermore, there is no evidence from which to conclude that representatives of the counties were not permitted to attend, but only that they did not attend. (63a).

In fact, the Counties were quite well informed about what the Court was discussing with its employees. (354-355b; 815-821b.)

[9] See, e.g., Appellants' Brief, pp. 17 et seq.

[10] AO 1998-5, which superseded AO 1997-6, was issued contemporaneously with this Court's decision in Judicial Attorneys Ass'n v State of Michigan, 459 Mich 291; 586 NW2d 894 (1998), to aid in effectuating the decision and underscore the need for close cooperation between courts and their funding units. Id. at a 305-306. See also, Justice Taylor's comments: "[I]n the interest

Not only were the two benefits contractually committed, they became reasonable and necessary once they had been committed, and employees conceded other existing benefits. Appellees have never maintained, as Appellants suggest, that employee morale made the two benefits a necessity at the time they were first proposed in May 2000, or that they could be described as reasonable and necessary in the abstract. In May 2000, the Trial Court was concerned about excessive turnover, and employees in the three Counties had endured a wrenching consolidation process. But Judge Davis did not approach the three Counties with the demand that these benefits were then required as a matter of constitutional imperative.

Instead, subsequent events of Appellants' own making created unique circumstances which then made the benefits reasonable and necessary.

As Appellants must recognize,[11] a crisis in employee morale developed only because the Trial Court's employees agreed to give up existing benefits in return for the promise from the Court and the Counties that the employees would receive the two retiree benefits in return, and because Appellants then pocketed and kept the consideration the employees had given up while they reneged on their commitment to fund the benefits.

It should not require empirical evidence to support the common-sense conclusion that employee morale would plummet under these circumstances. Nevertheless, Appellees will detail the trial testimony supporting that finding by the trial judge. It should also be evident to this Court (and to amici curiae) that the facts of this case are so unusual that Appellants' alarms about

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of providing guidance to avoid potential separation of powers concerns in implementing Act 374, I agree with the Court's issuance of an administrative order that affirms and extends provisions of Administrative Order 1997-6." Id. at 307. Furthermore, the senior partner in the firm that has represented Appellants throughout this litigation, Peter Cohl, acting as a representative of amicus Michigan Association of Counties ("MAC") (Mr. Cohl is its longtime general counsel), had substantial input into the form of the order.

[11] Appellants' Brief, at p 60, quotes but twists the argument of Appellee's counsel to the Court of Appeals.

every disappointed employee expectation becoming a springboard to an "inherent powers" claim are completely unwarranted. Here the Court's employees were "set up" for profound uncertainty and the prospect of disappointment by Appellants, especially Crawford County, which promised and passed resolutions, and then reneged on their commitments. This unique fact pattern is unlikely ever to recur, and does not set a precedent that should strike fear into other funding units or cause concerns that the constitutional balance has been upset.

As Appellees have noted, the unified arrangement that formed the 46th Circuit Trial Court must be viewed as a partnership that can function only if all members operate in good faith. It cannot work if partners fail to pay their fair share and make commitments and then fail to keep them. The issues that this case presents should be viewed against the backdrop of this partnership analogy, an analogy this Court has itself drawn in AO 1997-6 and carried forward in AO 1998-5.

STATEMENT OF FACTS AND PROCEEDINGS

Because the historical background of this case is extensive and complex, Appellees respectfully submit that this Court's understanding will be better aided by incorporating the facts pertaining to each of the three issues posed with the discussion of that issue. Appellees do not agree with Appellants' biased presentation of those facts. The following brief summary of those aspects of the litigation pertinent to this appeal provides a general overview.

On November 19, 2002, in the wake of drastic funding cuts made by Crawford County to the Trial Court's budget for 2003, the Court filed a four-count complaint against Crawford. Count IV alleged that Crawford failed to provide sufficient funds for the Trial Court to carry out its mandated functions during the 2003 budget year. Count III made the same claim regarding the 2001 and 2002 budget years, but the amounts at issue were much smaller. Count I alleged

breach of an express contract among the Trial Court and the three counties to fund the MERS B-4 upgrade and the retiree healthcare plan. Count II alleged an implied contract on the basis that Crawford had received and retained the benefit of the employee concessions traded for the benefit improvements and could not refuse to fund those benefits, even if there were no express agreement.

On December 9, 2002, Crawford answered the Trial Court's complaint and filed a counter-complaint focused on the employee benefits. The gist of this pleading was the charge that the Trial Court had fraudulently misrepresented the cost of the retiree healthcare proposal and the B-4, leading Crawford to approve those benefits. Simultaneously, Crawford filed a third-party complaint against Otsego, and Kalkaska intervened as a third-party plaintiff asserting claims against the Trial Court and Otsego that were identical to Crawford's.

The State Court Administrator assigned Kent County Circuit Judge Dennis C. Kolenda to preside over this case and a subsequently consolidated case filed by Appellants against Otsego.

In late March 2003, after expedited discovery, all parties filed motions for summary disposition. The Trial Court moved for dismissal of the Counties' fraud counter-claims. The Counties moved for summary disposition of all of the Trial Court's contract and inherent powers claims. After hearing arguments on May 1, 2003, Judge Kolenda issued an Opinion and Order on May 30, 2003. (8a-32a.) He struck the Counties' fraud allegations against the Trial Court (awarding sanctions against their counsel for bringing some of those allegations), denied the Counties' motions to dismiss the Court's contract claims, and directed that the contract and inherent power claims against the Counties proceed to trial.

Judge Kolenda heard the testimony of fourteen witnesses at a bench trial on June 17-20, June 30, and July 1, 2003. After considering the evidence and evaluating the credibility of the

witnesses, he issued a 53-page July 25, 2003 opinion containing his findings of fact and conclusions of law, together with an accompanying order. (33a-87a.) The opinion detailed numerous efficiencies achieved by the Trial Court and found that the Court had made all possible cuts that would not impair its ability to function. It also found that the Trial Court had met its burden of proving that its requested budget for 2003 (as recently modified) was both reasonable and necessary. Judge Kolenda also found that both Appellants had entered into enforceable contracts to provide the two benefits to the Court's employees, who had given up other benefits and acted in reliance on their commitments. He rejected as factually unsupported Appellants' argument that the existence of an agreement was conditioned on the execution of a written contract by all funding units.

The Counties paid the amounts the trial judge ordered. For a time the consolidated cases remained open because, in the companion case, Otsego's claim against the Counties for reimbursement of its own attorney fees and of payments it had made toward the Trial Court's attorney fees was not yet resolved. Eventually, a final order was entered pursuant to stipulation on February 26, 2004. (Up to this time, no argument had been presented to the trial judge that the agreement about benefits, if Appellants in fact made it, was outside their powers or had automatically terminated when new Boards took office on January 1, 2001.)

After entry of the final order, Appellants began this appeal challenging the July 25, 2003 Order compelling funding and other rulings connected with the merits. The Court of Appeals issued its published opinion on May 3, 2005. 46th Circuit Trial Court v Crawford County, 266 Mich App 150; 702 NW2d 588 (2005) ("46th Circuit Trial Court II.")

ARGUMENT

I. THE LEVEL OF FUNDING OFFERED BY APPELLANTS WAS INSUFFICIENT TO ALLOW THE COURT TO FULFILL ESSENTIAL COURT FUNCTIONS

A. Standard of Review

The "inherent powers" doctrine at the heart of this issue is a judicially created constitutional principle. Issues regarding the constitutionality of a statute or the interpretation of constitutional doctrine are reviewed de novo. DeRose v DeRose, 469 Mich 320, 326; 666 NW2d 636 (2003); People v Davis, 472 Mich 156, 159-160; 695 NW2d 45 (2005). But that does not mean, as Appellants suggest, that every factual determination underlying a ruling on an issue of constitutional law is subject to de novo review.[12] For instance, "in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings. Rather, the court should exercise independent judgment regarding whether, as a matter of constitutional law, the evidence in the record supports the verdict." Locricchio v Evening News Assn, 438 Mich 84, 111-112 n 17; 476 NW2d 112 (1991). Accord, Veilleux v National Broadcasting Co, 206 F3d 92, 107 (CA 1, 2000).

Ornelas v United States, 517 US 690, 699-700; 116 S Ct 1657; 134 L Ed 2d 911 (1996), confirms this view in another context. The United States Supreme Court held in Ornelas that, while "as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal[,] . . . a reviewing court should take care both to review findings of

[12] Appellants now argue that "appellate review of any findings of fact by a lower court must be de novo, to assure proper deference to legislative prerogative and requisite strict adherence to constitutional responsibility." (Brief, p 22.) They have changed their tune since stating in their Application: "To the extent the constitutional claim depends on findings of fact following a bench trial, such findings are reviewed for clear error." (Application, p 13.) Furthermore, Appellants mischaracterize the federal precedents they cite as supporting broader review, none of which involve "legislative prerogative." In civil litigation, the doctrine of independent review is limited to cases involving First Amendment claims.

historical fact only for clear error and to give due weight to inferences drawn from those facts [by judges and law enforcement officers]." (Emphasis added.) The Supreme Court also emphasized that an appeals court "should give due weight to a trial court's finding that the [arresting] officer was credible . . . ." Id. at 700. Similarly, in Bose Corp v Consumers Union of US, Inc, 466 US 485, 500-514; 104 S Ct 1949; 80 L Ed 2d 502 (1980), a product disparagement case involving the constitutional requirement that a libel plaintiff prove "actual malice," the Supreme Court observed that Fed.R.Civ.P. 52(a) continues to govern findings of historical fact and credibility.

In this case, then, while the "ultimate fact" of whether a particular level of funding was "reasonable and necessary" for the Trial Court's operation can be reviewed de novo, the trial judge's findings regarding historical facts and the credibility of witnesses remain entitled to the deference required by MCR 2.613(C).

Appellants quote from Employees & Judges of Second Judicial District Court v Hillsdale County, 423 Mich 705, 724-25; 378 NW2d 744 (1985), suggesting that this Court there made de novo determinations of historical facts in a court funding case. (Brief, p 22.) Not so. As the passage quoted makes clear, the Hillsdale Court conducted no factual review because there was no contention in that case that the satisfactory functioning of the plaintiff court was in jeopardy. Id. at 722.

With respect to the level of proof required for a court to obtain additional funding, this Court's order granting leave appears to accept that a court must satisfy the "reasonable and necessary" test articulated by Justice Riley in Hillsdale, 423 Mich at 738-740, 743-745, and adopted by the Court of Appeals in Seventeenth District Probate Court v Gladwin County Board

of Comm'rs, 155 Mich App 433, 453; 401 NW2d 50 (1986). Both the trial judge and the Court of Appeals applied that standard. (75-76a; 123-124a.)[13]

B. The Pertinent Historical Background

It is unquestioned that by year 2001 a dispute had arisen between Crawford County on the one hand, and the Trial Court and Otsego County on the other, over the funding of the retiree health care fund.[14] Crawford began to withhold from its reimbursement payments to Otsego, the control unit, amounts it deemed to represent the cost of the health care benefit – as well as the amount by which Crawford's 2001 appropriation had fallen below its 24% share of the 2001 budget.[15]

The cost of the health care benefit was, however, quite modest. For year 2001, for instance, Crawford's eventual net cost of both benefits – taking into account the savings generated by the employee concessions – amounted to approximately $11,520.[16] Crawford,

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[13] Appellants argue, in addition, that in any "inherent powers" suit filed by the executive or judicial branch, those branches "must plead and prove that the appropriations do not allow functioning at a 'serviceable' [i.e., barely adequate] level." (Brief, 20-21.) Whether this standard – articulated in two Court of Appeals cases brought by executive officers – applies to the judiciary has not been decided. This Court's references to "reasonable and necessary" in framing the issues here do not appear to credit the "serviceable" standard. But no issue requiring this Court to decide the applicability of that standard is presented, for the lower courts found that the Trial Court's proofs satisfied that demanding standard. (124-125a.)

[14] The Trial Court's Implementation Order 2000-11, entered December 4, 2000, did not create any new obligations, but simply effected what the counties had already agreed to by resolution. (PX 29; 722-723a.) An implementation order is the mechanism the court had routinely used in such circumstances. (For example, see 1040b, noting that the funding units wanted Judge Davis to issue an implementation order transferring funds from Antrim County to Otsego.)

[15] Kalkaska did not withhold payments in the same fashion until December 2002. When the nascent dispute with Crawford was mediated in June 2001 pursuant to AO 1998-5, Kalkaska had yet to raise any funding issues with the Trial Court, and Crawford had not identified the MERS B-4 benefit as a point in controversy. In fact, the position statement Crawford submitted to the mediators made no mention whatever of a dispute over the B-4. (392-395b.)

[16] The actual net cost of the two benefits can be easily approximated using rounded numbers. As Appellants' expert Fred Todd acknowledged and Judge Kolenda found, the initial increased cost resulting from the MERS B-4 is $105,000 (51a, 1638a.) The initial Retirement Health Fund

however, withheld the gross cost of the health care benefit (in addition to other unrelated sums), not even giving the Court credit for the savings generated by employee concessions.

Crawford's withholding of payments to Otsego for the two benefits is not, however, what triggered this litigation. Instead, when Crawford finalized its budget for its 2003 fiscal year (which – unlike Kalkaska and Otsego's – began on October 1, 2002), the Board of Commissioners – acting on the recommendation of its Controller – implemented a draconian 19.4% reduction in the shared cost budget proposed by the Trial Court. This, like less drastic cuts Crawford unilaterally made in 2001 and 2002, was not negotiated or even discussed. Rather, it involved unilateral slashing of a carefully composed budget submitted to the three funding units for approval. This history, summarized in Judge Kolenda's Opinion (52a), is fully supported in the record and discussed infra.

In the summer of 2002 Mr. Edel, as he had in the past, submitted a proposed line-item budget for 2003 to Crawford and the other two funding units. (1090-1113b.) Mr. Edel had twenty-four years of experience as a court administrator, with involvement in the budgeting process. The 2003 budget proposed an increase in shared costs over the 2002 budget that reflected increases in Blue Cross Blue Shield premiums, the agreed-upon annual wage increase, and an increase in the cost of retirement benefits due to the cost of the two benefits. Id.

As in prior years, the proposed budget was reviewed by Paul Compo, who had become Crawford Controller in November 1998, and whose previous experience in budgeting had

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payment was $50,000. These amounts total $155,000. The value of the savings resulting from employee concessions – $87,000 annually for the switch to a PPO-1 with a $10 drug card (50a; Tr 345, 467), $10,000 for the 1/2% raise (51a; Tr 344, 356, and $10,000 for the longevity (Crawford and Kalkaska's Brief, p 3) – totals $107,000. Subtracting the $107,000 from the total increased/continued cost of $155,000 leaves a net added cost of $48,000. Crawford's share of this net cost is $11,520 at a 24% multiplier or, at the 27% figure applicable in 2003, $12,960. State reimbursements further reduce those actual net costs to the Counties (54a; 652-653b.)

involved managing a Denny's restaurant. (915-916b.) Mr. Compo explained at trial that he regularly adjusted downward the budget requests of all Crawford departments by approximately 25 percent, and he repeated this practice in the summer of 2002 because the total of the departments' requests exceeded Crawford's predicted 2003 revenues by approximately $1 million. (920-921b.) The Court was thus caught up in a process that had nothing to do with its functioning, and everything to do with Crawford's operations.

Focusing only on Crawford's proposed revenues, i.e., what it could afford, and without consulting its funding partners Kalkaska and Otsego Counties, or the Court, or closely examining the Trial Court's needs, Compo began to slash the Court's budget request. (953-955b.) Looking at the Court's proposed personnel costs, he noted that they were higher than Crawford's.[17]

The budget cuts Compo eventually recommended to Crawford's Board (which accepted them) reflected no discussion with the trial court about the "merits" of its request. He explained that he did not engage in any "give and take" with the court on any item, because "we do not do that with the other departments." (962b.) He testified:

> A: It's not a group project because we don't do a group project with other departments. I don't sit down with building and zoning and tell them they can't buy a truck this year.
>
> Q: Isn't the court a little different than a department of the county?
>
> A: I guess that's a subjective question. In some ways they are and in some ways they aren't. (963b.)

Testifying first about the budgeting process generally, but then specifically with respect to the Trial Court, Mr. Compo continued:

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[17] When asked why he did not undertake to also compare what the court was proposing to Otsego and Kalkaska regarding employee benefits, Compo testified: "I guess my answer would be, I only have one general fund that I am worried about. I wasn't worried about Kalkaska's and Otsego's." (953-954b.)

Q: So what you would have done when, for instance, you looked at these budgets that reflect some reduction, you would have done as you described; you cross something out and say there's a -- a body going to be out of there, that kind of thing.

A: Yes, sir.

Q: Now, are you suggesting that that's the way it should or could work with the court as well?

A: I'm suggesting that the court is a piece of the resources we have available to allocate.

* * *

Q: So you're saying -- you -- you start with the same approach fixing on a number as you do with the other departments; but as you might with your own departments where you then have some dialogue about what bodies might drop out or might -- how they might do it, with the court you simply given them the reduced number and you expect the court to cut where it sees fit.

A: I would expect that the court would have a better understanding of where those cuts could take place.

Q: Is that a "yes" to my question?

A: In very general terms, yes.

Q: Okay. Are you aware of the fact that when you cut for instance the court's budget by an amount, whatever it is, that the impact it would have on the court would be to multiply that number essentially by four?

A: Yes.

(964-966b.)

Mr. Compo confirmed that his budget cuts were not driven by any assessment of the merits of the court's request; rather, the decision was driven by what he felt Crawford could afford:

> Q. And how do you do that? I mean you see the court's line items; you see this and that. How do you decide where to cut and what to cut?
>
> A: We don't get too far into where to cut. We've -- from Crawford's standpoint, we're an advanced payment or we're a reimbursement vehicle for Otsego County. . . And the court in our estimation would have a better handle on line items, on what can or can't be cut or what should or shouldn't be cut, or what could be reworked. We have to present a balanced budget to our board, and considering all those things we try to give them as much as we can afford.
>
> Q: So your approach isn't as much, if you will, on the merits of their request but, as I understand your testimony, it's driven by your resources.
>
> A: Yeah. We can't pay that what we don't have.
>
> (969-970b.)

Kalkaska later gave the Court's request even less consideration. Without even looking at its own needs, it simply followed the template established by Crawford County, cutting the Court's request by its corresponding share – now 28% – in December 2002. (1035b.)[18]

A few months before Crawford's actions, the Trial Court had responded to a request from Otsego County to reduce overall costs by $84,000; the Court nearly but not entirely achieved this reduction through a combination of layoffs, targeted reductions in incidental expenses, and increased revenues. (696-699b, 766b; 1114-1118b; 1139b.) This change benefited all three funding units in accordance with the agreed-on sharing formula.

While the Court had just eliminated 2.5 positions in the foregoing effort, Crawford's position was that it should simply cut ten more in order to meet Crawford's view of a desirable budget. (694-695b.) The Court pointed out that further cuts would have to begin with non-

[18] It was agreed that Mr. Wright's post-trial deposition would be deemed an addition to the trial record because he was unavailable during the trial. (1033b.)

mandated functions, of which Probation was the only candidate. The Court repeatedly explained that eliminating or significantly reducing Probation would not only encourage recidivism, but would also shut off an important source of revenues for the funding units, resulting in a net loss instead of a savings. (689-695b, 798-799b.) Crawford refused to understand this message.

Three funding units – Crawford, Kalkaska and Otsego – divide up the shared operational costs that comprise most of the Trial Court's budget, with Crawford paying approximately one-fourth. As Mr. Compo acknowledged, every $1,000 reduction in Crawford's appropriation for shared costs therefore reduces total appropriations from the three counties by some $4,000 – unless the other counties volunteer to subsidize Crawford. (966b.) If all three funding units reduced the Court's 2003 budget in proportion to Crawford's drastic cuts, the Court's overall funding for shared costs would have been reduced by $609,597 – 19.4% of a total request of $3,147,304! (52a; 1090b.)[19]

If unchecked, a reduction of this magnitude ensured the Trial Court's shutdown well before the 2003 fiscal year ended. (86a; 743b, 800-802b, 1024-1030b.) Otsego (to which Crawford still owed money for 2001 and 2002 outlays made by Otsego as the control unit) decided it could not adopt a 2003 budget for the Court that the other funding units would simply ignore. Otsego fully supported the Court's proposed budget, yet understandably had no choice

[19] Judge Kolenda's findings in this regard are supported by testimony as well as exhibits. (745b; 1132-1138b.) To clarify the origin of this budget shortfall – which Appellants have previously claimed was in fact a net increase – the situation developed as follows: Crawford reduced its shared costs part of the court's 2003 budget request by a whopping $164,591 (from $849,772 to $685,181) (1132b.) However, Crawford then claimed credit for the increased "cost" of Judge Hunter, notwithstanding that his salary was fully paid by the state (the same circumstance obtained in Kalkaska with Judge Buday, their new full time probate/district judge), as well as for the increase in Crawford's shared cost from 24 to 27% ($94,420) despite the fact that this did not represent additional funds available to the Court. This, then, generated Appellants' earlier argument that their 2003 budget granted a supposed increase of $71,773, or 9.5%. (Application, p 4.)

but to announce a "pay as you go" approach. That meant – as Judge Davis testified – that the Trial Court faced shutdown in late July or August 2003, when Crawford was sure to announce that its appropriation for its October 1, 2002 to September 30, 2003 fiscal year was exhausted. (800-803b.) Judge Kolenda's Opinion recognized this urgency (which had been discussed and acknowledged in all quarters during in camera conferences), commenting that the Order for additional funding had to be made immediately effective because "[v]indication for a corpse is of no value." (86a.)

Thus, for Appellants (who invariably speak only with Crawford's voice and refer only to Crawford's figures) to call their budget reduction an "increase in the Court's budget" in light of these special circumstances, is sophistry of the most offensive kind.[20]

Clearly, the case was commenced to address this emergency: the prospect of a crippling total reduction of $609,958 that would shut down the court. As the mid-June 2003 trial date on the inherent powers claim approached, the Trial Court sought to focus the dispute through a motion in limine. It argued that the two benefits represented one identified point of contention, but that it made no sense to litigate over each of the Court's overall expenditures, many of which had been universally accepted for years (1289-1298a.) Appellants opposed the motion in limine,

[20] The fiction of equating budgeted gross "expenditures" with amounts that the funding unit is out of pocket, as Appellants do, exacerbates Appellants' misrepresentation. The "net cost" to the funding units of supporting court operations is a fraction of the budgeted expenditures. As Judge Kolenda explained in detail, 79-80% of the Trial Court's annual budgets were "supported by such court-generated revenue as fines and costs assessed in criminal cases; partial reimbursement by criminal defendants of the cost of court-appointed counsel; reimbursement from the State for the judge's salaries, . . . for FOC operations, etc.; grants for special projects; and annual payments from the Court Equity Fund." (54a; 741b.)

insisting that the Trial Court should justify every aspect of its overall budget. (1302-1312a.) Judge Kolenda denied the motion. (2b.)[21]

Thus, when trial began on June 17, 2003, the Trial Court was not only fighting for its very survival, but was forced to justify every aspect of its budget, from number of positions to salary levels to the use of three cell phones.[22] This was nothing short of absurd, given that prior to 2001 Crawford had had no problem with the Court's budgets (Trp 1088; 934b), and that in early 2002 the Michigan Department of Treasury had reported that court unification had reduced funding costs and saved the three Counties an estimated $1,150,000 during 1997-2001. (41a; 1140-1143b.)

C. The Record Establishes Beyond Dispute That The Funding Ultimately Ordered By Judge Kolenda Was The Minimum Necessary To Enable The Court To Fulfill Its Mandated Functions.

Without wishing to sound presumptuous, the 46th Circuit Trial Court believes that the first issue framed by this Court, which Appellants appear to virtually concede (except as it pertains to the two benefits), arose from Appellants' false claim that Crawford had increased the Court's 2003 budget, whereas in reality it had effected drastic cuts. Indeed, Appellants' argument on Issue I is limited to a discussion of the two benefits, without any real claim that other expenditures of the Court were not reasonable and necessary. (Brief, pp 24-25.)

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[21] With stunning gall, Appellants insinuate that the trial involved only the two disputed benefits – implying that this came about because the Trial Court filed a motion in limine seeking to avert a cumbersome trial of an across-the-board attack on its budget. (Brief, p. 2, n. 2.) Yet Crawford and Kalkaska fail to mention that they opposed this motion, and that Judge Kolenda denied the motion at their behest, resulting in just such an expansive trial.

[22] Although the court's administrators are responsible for a three county area and travel frequently, Appellants challenged the need for cell phones and other "questionable" items such as a staff meeting. Controller Compo and other Crawford representatives spent days in Otsego sifting through the Court's disbursement requests, but not a single improper expenditure was demonstrated at trial. (1936-1951a; 932-937b.)

Because it cannot be disputed that Crawford's 2003 budget cut, once mimicked by Kalkaska, was forcing cessation of court operations in mid-2003, it seems axiomatic that the amounts Appellants budgeted were insufficient. But the 46th Circuit Trial Court cannot afford to be wrong in its assessment of this issue, and thus details here the record evidence supporting Judge Kolenda's findings that the Court's budget requests were reasonable and necessary.[23]

1. The Court Reached A State Of High Efficiency Through The Consolidation Process That Took Place In 1996-2000.

In July 2003 the Unified Trial Court had 58 non-judicial employees; when it began in 1996 there were 64. However, five of the positions at the time of trial were funded primarily by new grants obtained by the Court for family and juvenile services. Thus, there had been a net reduction of 11 positions as a result of court unification. Meanwhile, the Court's workload had increased substantially. (649b, 773-775b; 1144-1147b.)

The Court's organization chart depicts its arrangement into three divisions that report to the administrators and judges: Family and Probate (including Friend of the Court personnel, juvenile caseworkers, probate registers, and juvenile registers)[24]; District (including clerical personnel, probation officers, magistrate/compliance officers, and recorders); and Circuit (including assignment clerks, secretaries, and one recorder), for which the respective County Clerks maintain the files. (PX 120; 1213-1216b.) At trial Mr. Edel went through the organization, identified most of the individuals who held these positions, and explained how a

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[23] Judge Kolenda's decision actually reduced the court's 2003 funding to the level of a proposal the Trial Court submitted the week after trial, a proposal solicited by Judge Kolenda. The overall reduced budget (for all three counties) was $124,754 lower than the original summer 2002 request. (411-421b.)

[24] The legislation that created the Family Division of Circuit Court, 1996 PA 388, which merged juvenile court employees in the three counties, Friend of the Court staff, and others into an integrated unit, further underscored that the Court now operated across county lines to benefit the tri-county community.

number of them had come to perform the duties of two or more positions as a result of consolidation. (Id., I, 98-104, 681-687b.) He presented a comprehensive set of job descriptions covering all staff positions, each one setting out how the position performs duties that are mandated by constitution, statute, court rules or administrative requirements. Part of this exhibit was a spreadsheet describing the various statutes and court rules that apply to each position – in other words, the services that each employee is mandated to provide. (1198-1212b.)

Both Mr. Edel and Judge Davis testified that in mid-2003 the Court's personnel were stretched to the limit.[25] Mr. Edel described the employees as working very hard and "giving 110 percent." (704b.) The workload of district court staff had increased significantly as a result of legislated increases in jurisdictional thresholds, and some of that work had been assumed from the county clerks. (PX 109; 658-659b, 747b.) An internal management review performed by the Court pursuant to a SCAO-provided checklist showed that the Court was failing to meet a number of administrative requirements, most in the area of timely scheduling or compliance follow-up. (1217-1219b; 700-704b, 762b.) Judge Davis described the Court as "pared down to a point where it can still do its job and do it effectively....But we can't do anymore [reductions] and still continue." (786b.)

Mr. Edel agreed that the Court was "staffed really at the barebones." (698b.) He noted that whenever employees were absent, "we don't get the work done." In mid-2002 eight employees were placed on 30-hour weeks for three months as a result of a cost saving effort; the Court fell behind on their work, and it caused a stressful catch-up period. (698b.) Mr. Edel testified that, until 2003, he had heard absolutely no criticism from any funding unit of the need for a particular position or the volume of work being performed by a particular employee.

[25] At this time, 2.5 employees had been on layoff since June 2002. (699-700b.)

(687b.)

There was no testimony at trial to indicate there had been serious budget disagreements prior to the 2001 budget. Mr. Compo acknowledged there had not been any. In fact, for fiscal 2000, the Trial Court returned money to Crawford because it did not spend the full appropriation. (941b.) This general lack of controversy could not have existed if the Trial Court had not already attained a well developed state of cost efficiency.

During 2002 the Court showed a capacity to be flexible and did make cutbacks. That June, Otsego, as the control unit, asked the Court to achieve a reduction of $84,000 in net cost for Trial Court operations because of financial constraints, but said that the savings could be realized through a combination of decreased expenditures and increased revenues. (766b.) These budget savings, of course, benefited all three counties proportionally. The Court responded to this request by eliminating almost all overtime, reducing mileage reimbursement to .30 per mile, curtailing travel and conference attendance, canceling vendor contracts, raising substance abuse screening fees, and the like. (696-698b.) It also laid off one Friend of the Court caseworker, one District Court deputy clerk working in Kalkaska, and one part-time District Court probation officer in Crawford. (699-700b.)[26]

2. The Trial Court's Salary Structure Was Carefully Determined.

Judge Davis and Mr. Edel described at trial the origins of the Trial Court's salary and benefit structure. When the Court was forged from six separate courts, there was a predictable hodgepodge of different personnel policies, wage scales, and benefit structures. Both the employees and the Court believed that like jobs should receive like pay with like benefits,

[26] Judge Davis described how layoff of this part-time probation officer in Crawford adversely affected the ability of the District Court to generate revenues for the county; the probation sentencing option is more flexible and fee-generating. (797-799b.)

regardless of geographic location. In 1998, the Court standardized personnel policies on such subjects as vacation and sick leave. These policies were sent to the Funding Units for their input before implementation. (I, Edel, 78-81; 661-664b.) The Court then moved on to the task of creating an equitable salary structure.

At the Trial Court's request, a SCAO personnel analyst conducted a classification study using a standard questionnaire method for evaluating a job's complexity, level of responsibility and other relevant factors. The study classified all non-judicial positions into pay grades 2 through 18, and the Court used these results in setting compensation levels for 1999. (1037-1038b; 1149-1168b; 664-668b; 809-811b.) The Trial Court then obtained wage information from six circuits covering all of northern Michigan and used it to set equivalent wage ranges for comparable positions. This process was repeated in early 2003. (1169-1197b; 668-669b; 673-676b.) The compensation of individual employees was adjusted by taking into account their length of service and how their current salary compared to the range for their position. Id.

The process of bringing everyone into parity took several years, for the Court wanted to work within the limits of each year's budget line item for wages without reducing anyone's pay – though a few employees who exceeded range maximums were temporarily frozen. The Court believed that making pay cuts during this process would have a very serious impact on morale. (670-671b.) Judge Davis emphasized at trial that the Court "wouldn't be the slightest bit competitive" if it had reduced employees' pay, and would not be able to attract qualified staff for professional positions like juvenile social workers if that occurred. (787b.)

3. Appellants' "Evidence" That The Trial Court's Personnel Costs Were Too High Is Unpersuasive.

When the 2001 budgeting process began the Trial Court had operated for over three years, working to achieve significant cost reductions without any claim that its budgets in the prior years were excessive. Yet the cuts made in 2003 (and by Crawford in 2001 and 2002) were made arbitrarily and without any assessment of the court's needs or efficiency. See discussion, supra, at p 15.[27]

Appellants' attack on the Court's non-benefit spending at trial was based on the testimony of two witnesses: their discredited expert, Fred Todd, and Crawford Controller Paul Compo. Mr. Todd, who prepared his testimony in the two weeks before trial, focused only on selected items in the 2003 budget, and without employing any sound methodology. (1011b.) First, he looked only at ranges of salaries, not at whether the actual pay of individual employees was reasonable in light of their experience. (Todd, 995-999b.) Second, he used the wages of certain County employees, rather than the wages of employees in other courts, as a benchmark, despite acknowledging that they might not be comparable. Moreover, he looked only at Crawford for comparisons, and thus disregarded Otsego. ("Otsego wasn't my client, and I didn't have the data," Mr. Todd testified.) Even within Crawford he excluded law enforcement personnel because they were paid more. (993-995b, 1000-1002b.)

With respect to whether the Court was budgeting for positions that were not carrying out mandated functions, Mr. Todd opined only that the judicial law clerk was not a mandated function. (976b.) Mr. Todd also conceded that he performed no analysis of how the Court was functioning or whether it was operating efficiently. (991b.)

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[27] The only arguably identified cost reduction pertained to the two benefits; but, as pointed out in fn 16, supra, the net cost (before reimbursements) in 2003 amounted to only $12,960 for Crawford annually, compared to Crawford's cut of $164,591.

Mr. Todd addressed the Trial Court's overall budgeting only with respect to the 2003 budget (1011b.) He had no opinions concerning the 2001 and 2002 budgets. When the trial judge asked Mr. Todd just what he saw in the Court's budget requests that was unreasonable, Mr. Todd ventured that having fringe benefit costs that were 55% of wages appeared unreasonable on its face. (977b-979b.) But the Unified Court subsequently introduced exhibits showing that the same ratio for County employees was 54% in both Crawford and 54% in Kalkaska. (770b; 1231b-1254b.)

Furthermore, as Judge Kolenda found, Mr. Todd's testimony must be examined with appropriate skepticism. For Mr. Todd had adopted the role of Crawford's advocate long before this dispute ripened into litigation and before he conducted his eve-of-trial research on expenditures other than the cost of the two benefits.[28]

Despite the ease with which he demanded arbitrary cuts, Mr. Compo's testimony was wholly ineffective in establishing that any part of the Court's budget was non-essential. A significant part of his direct testimony was introducing several spreadsheets (1936-1951a) prepared as a result of an extensive Crawford review of expense invoices paid by Otsego that Compo and those working with him deemed "questionable." (928-929b.) Yet on cross-examination Mr. Compo acknowledged that he was not identifying any particular item as unreasonable, but was simply suggesting that a closer review might yield some opportunities for the Court to cut expenditures. (936-937b, 971b.)

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[28] It is well established that an expert who approaches his task of "forming" opinions with a clearly preconceived conclusion is not offering impartial testimony helpful to the fact finder. As Judge Kolenda recognized, the testimony of such an expert should be excluded or given no weight. Vitervo v Dow Chemical, 646 F Supp 1420 (ED Tex 1986), aff'd, 826 F2d 420 (CA 5 1987); United States v Kelly, 6 F Supp 22d 1168 (D Kan 1998); Conde v Velsicol Chemical Corp, 804 F Supp 972, 984 (SD Ohio 1992), aff'd 24 F3d 809 (CA 6, 1994).

As already noted, Mr. Compo described how Crawford went about setting the Unified Court's budget for fiscal years 2001 through 2003. He treated the Court "the same as...anything else we fund..." because "they all come out of the same amount of resources." (964b, 963b.) Ultimately, the Crawford simply gave the Court the reduced number and expected the Court to trim expenditures where it saw fit. (966b.) Nor did Crawford discuss what it intended to appropriate with the other two funding units, even though it knew that any reduction it made in the Court's budget would be multiplied by approximately four when extrapolated to the entire budget. (962b, 966b.)

Mr. Compo repeated that Crawford did not contend that any budget prior to the 2001 budget discussed in the summer of 2000 was unreasonable or contained unnecessary expenditures:

> Q. And the first one you worked on [the 2000 budget] you saw no problem with?
>
> A. Not that I recall.
>
> Q. And you haven't identified or nobody hasn't identified for you a budget problem for the prior years?
>
> A. With the court's budget?
>
> Q. Right.
>
> A. Not that I recall.
>
> Q. Okay. So there isn't any dispute here, is there, about the reasonable and necessary expenditures of the court up at least to this point when we start with the summer of 2000, as far as you know.
> A. Not as far as I know. I don't know. (940b.)

4. The Testimony Of The Unified Court's Experts Confirmed That Its Staffing And Budget Requests Were Reasonable And Necessary.

Retired Oakland County Circuit Judge Barry Howard served on the Oakland County Circuit Bench for about 12 years, approximately one-half of that time as Chief Judge or Deputy Chief Judge. He was thus well acquainted with court staffing and funding issues. (833-836b.) He was President of the Michigan Judges Association in the year 2000, served on the Council of Chief Judges, and worked with five Michigan Supreme Court Chief Justices concerning court reform.

Judge Howard testified that all of the court's positions other than district court probation and law clerk to the judges involved mandated functions. However, probation and legal research are so related to other mandated functions, that they can be perceived as mandated as well. For example, while constitution, statute or court rule may not define the position of law clerk as mandated, the work done by the law clerk would otherwise have to be done by the judges. It thus involves mandated work and assists the judges in performing that work. (836b.)

Judge Howard endorsed the comparative process used by Mr. Edel in setting the salaries of the Court's employees. He agreed that it was more accurate to compare court employees with employees in other nearby courts, as opposed to comparing them to county employees, just as Sheriff's Department employees are compared to other Sheriff's Department employees in counties of comparable size during Act 312 arbitrations. (839-842b.)

Until he retired in 2002, Mr. Ross Childs served for 26 years as County Administrator of Grand Traverse County, which participates in a three-county court funding arrangement. Mr. Childs had extensive experience in negotiating court budgets from the county side.[29] He also

[29] Mr. Childs testified that, because of the trust that had been established between local courts and the county during his tenure, the courts permitted him, as County Administrator, to negotiate

served on the Supreme Court Administrative Advisory Council, and spearheaded the litigation that resulted in the creation of the court equity fund. (847b-850b.)

Mr. Childs had reviewed the Unified Court's budgets and reported that he found no fat in them. (852b.) His review of SCAO reports indicated that the assignments, staff, and caseload per staff or caseworker in the Friend of the Court and Probation areas were consistent and within the ranges expected by the State. (852b.) Mr. Childs agreed with Judge Howard and Mr. Edel that one should look to court rather than general county employees as comparables in evaluating wage and benefit increases. (860b.) It had been his consistent practice in Grand Traverse to use the same 15 counties for purposes of such comparisons. (860b.)

Mr. Childs also testified that, while district court probation was not a mandated item, one would in effect lose the district court system if there was no probation staff. The probation staff is key to giving advice to the judge on sentencing, monitoring probationers, and following up to make sure that fines and costs are collected. (868b.) Mr. Childs' testimony reinforced the testimony of Mr. Edel and Judge Davis about eliminating probation being a self-defeating method of reducing cost, and ultimately Judge Kolenda agreed.

As to the reasonableness of the Unified Court's overall personnel costs, which Appellants attacked because they made up approximately 87% of the overall budget (1966a), Mr. Childs identified this as a non-issue: In Grand Traverse County personnel costs were about 85% of the budget, and that in county government they generally ranged between 85-90%. (868-869b.)

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their collective bargaining agreements. (853b.)

5. Conclusion.

Thus, the Trial Court provided ample evidentiary support that: (1) all of its budgeted positions were essential to the performance of its mandated functions; (2) it was staffed at a bare-bones level and would not be able to fulfill its mandated functions if it did not receive the level of funding contained in its amended budget request; (3) the compensation of its employees was reasonable and set after appropriate comparison and study; and (4) it had not budgeted for unreasonable or unnecessary expenditures. Appellees respectfully submit that Judge Kolenda was correct when he observed that the Trial Court was not required to wait for a breakdown to occur when it had shown that there was no room left to cut funding and keep up with its mandated work.

II. CRAWFORD AND KALKASKA COUNTIES EACH ENTERED INTO A CONTRACT WITH THE 46TH CIRCUIT TRIAL COURT TO FUND PENSION AND HEALTH CARE BENEFITS AT A SPECIFIC LEVEL.

A. Introduction.

While this Court suggested that contract issues should follow the two issues it identified pertaining to the Trial Court's inherent-powers claims, Appellees address the contract issue here because Appellants' contractual commitments provide the backdrop for Appellees' argument that the retiree benefits became constitutionally "reasonable and necessary." Judge Kolenda first addressed the contract issue in the context of motions for summary disposition filed by Appellants (these were denied) and by Appellee (this was granted in part and denied in part), and then deferred certain issues until trial. (8-32a.) Both sides have reprinted portions of the voluminous materials submitted to and considered by Judge Kolenda in connection with these motions.

B. Standard Of Review.

The Trial Court agrees that issues concerning whether an enforceable contract may be made in particular circumstances, and interpretation of contractual language, as well as rulings on summary disposition, are reviewed de novo on appeal. However, findings of disputed fact by the trial judge regarding the circumstances surrounding the making of an alleged contract are reviewed under the "clearly erroneous" standard of MCR 2.613(C). H J Tucker and Assoc, Inc v Allied Chucker and Engineering Co, 234 Mich App 550; 595 NW2d 176 (1999).

C. Facts Relevant To The Contract Issue.

During May through August 2000, the Trial Court and its three funding units resumed an earlier practice of meeting as a "Tri-County Committee" to address court-related issues. (650b, 811-812b.) Meetings were attended by several representatives of each of the three counties, by some judges, and by the Court's administrators.[30]

One catalyst for these meetings was that the Legislature severed Antrim County from the 87th District Court with unexpected speed in March, 2000. This major step toward matching the boundaries of the courts in the demonstration project with the boundaries of the three counties also provided the first real opportunity for a truly unified three-county budget. (812-813b.) It was also an ideal time to standardize employee health insurance and pension benefits, which had continued to reflect historical variations depending upon the court and/or county in which an employee worked. (814-815b.) Antrim was not only the control unit for the 87th District Court, it was the control unit for medical benefits for (i) all employees of that Court, (ii) all employees of the 46th Circuit Court (18 Friend of the Court employees and all other circuit court employees working in Crawford, Kalkaska and Otsego Counties), and (iii) the employees of the Otsego

[30] The usual Crawford attendees were Lynn Corlew, then chair of the Board of Commissioners, Commissioner Beth Wieland, and Controller Compo.

County Probate Court. (351-352b.) The only court employees in the six merged courts who did not participate in the plan administered by Antrim County were the four 83rd District Court employees in Crawford County and the few Probate Court employees in Crawford and Kalkaska Counties. (811b.)

Retirement benefits were even more balkanized. Court employees enrolled in MERS had a variety of benefit levels. Those working in Crawford had a B-2 benefit, Kalkaska Probate Court employees had a B-3 benefit, and Otsego Circuit and Friend of the Court employees had a B-1 base with a C-2 rider. (1257-1258b.) However, not all court employees were enrolled in MERS. Approximately 18 employees based in Otsego and Kalkaska who had worked for the 87th District Court or were tri-county employees participated in a Simplified Employee Pension ("SEP") a device similar to a 401(k) plan that consisted of individual employee accounts administered by an insurance company. (Id.) Appellants have repeatedly complained that these employees and their benefits should somehow be Otsego's "problem" because they worked in Otsego. First, that is untrue, as Kalkaska should know because it (unlike Crawford) was part of the previous configuration of the 87th District Court, along with Antrim and Otsego, and several of these employees worked in Kalkaska. Second, in the summer of 2000 these individuals were, by law and by virtue of the Counties' agreements with each other, employees of the Unified Trial Court – working with their fellow employees toward the administration of justice in the Tri-County area. (Id.; 627-628b.)

The funding units, as well, afforded their employees a wide range of retiree benefits, depending on the employee group. In Crawford, for instance, Sheriff's Deputies became eligible for a MERS B-4 benefit as of January 1, 1999; their contract also provided for retiree health insurance, and employees hired before January 1, 1988, qualified for two-person coverage.

(1121-1122b; 952b.)[31] Contemporaneous with trial, Crawford agreed in collective bargaining to give its Sheriffs' dispatchers a MERS B-4 retirement benefit.[32] (1012-1013b; see also, Attachment 2.) Kalkaska Controller Frank Wright testified that all employees in Kalkaska had a MERS B-4 benefit, except for one Teamsters unit that had a B-3. (1036b.) In Otsego, two units – the Sheriff Department road patrol, and elected and appointed county officials – had the B-4 benefit. A chart presented at trial showed the level of pension benefits for various units in the three Counties in 2000. (1255b; see also 351b.)

During meetings on May 26 and June 19, 2000, the Trial Court and the three funding units began laying the foundation for a closer partnership. They agreed that Otsego would serve as control unit for the entire Unified Court system and that shared costs would be apportioned according to a 44/32/24 (Otsego/Kalkaska/Crawford) percentage formula.[33] Each County soon confirmed this arrangement in identical resolutions, which provided:

> WHEREAS, In order to progress as a unified Court system, all entities must be in agreement; and
>
> NOW THEREFORE BE IT RESOLVED, That commencing with the budget for fiscal year 2001, and continuing for a period of three years thereafter, the Counties will meet jointly with the Court for the purpose of arriving at a yearly budget for court operations; and
>
> * * *

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[31] Mr. Compo testified that this six-year agreement with the Police Officers Association of Michigan called for annual wage increases of 4%, 6%, 4%, 4%, 3%, and 3%, and was retroactive to 1999. (PX 89; 949-950b.)

[32] Appellants make the unsupported claim that it is more fitting for law enforcement officers to receive a MERS B-4 because the nature of their duties places them at greater risk. But Crawford extended the MERS benefit even to dispatchers, who were not eligible for Art 312 arbitration because they worked for a separate department that is not a public police or fire department. See POAM v Lake County, 183 Mich App 558; 455 NW2d 325 (1990); POAM v Southfield, 1999 WL 33437842 (Mich App 1999; unpub. opinion released 8/20/99). In any event, they certainly do not expose themselves to risk.

[33] The Counties determine the allocation percentages for themselves from year to year.

> BE IT FURTHER RESOLVED, Otsego County as the designated control unit, shall bill each of the other two Counties monthly for their allocated share of expenses, requiring the Counties to pay their respective share of court expenses monthly . . . . (19-21b.)

The parties reviewed a draft unified budget, and the discussions were cooperative. It appeared to the Court that all three counties had accepted their roles as partners in the multi-county enterprise.

As discussed supra at 22-25, the Court's employees had undergone a stressful reorganization process, and the Court had experienced significant employee turnover as well. (715b; 1079-1081b.) In order to encourage the court's employees to stay (and to reward them), Judge Davis had previously approached the counties with the proposal that a part of the significant savings generated through the reorganization process ($1.15 million as of 2000) be set aside for unspecified benefit enhancements. The Counties rejected the proposal. Judge Davis reported this to the employees, urging them nevertheless to continue their enthusiasm for the Unified Court project. A unionization drive had been defeated as a result of a tie vote in this time frame. (808-814b.)

At the June 19, 2000 tri-county meeting, Judge Davis proposed the specific retirement healthcare and MERS B-4 benefit enhancements, which addressed areas he felt were lacking. He argued that some Court employees (of the three-county Circuit Court who happened to be based in Otsego, and Otsego Probate employees) already enjoyed a retiree health care benefit, and told the Counties that he would approach his employees with a proposal to make certain concessions (which he outlined) if the Counties in return would fund the two benefit enhancements. He was encouraged by the Counties' reaction. They did not reject the ideas, but indicated they warranted further discussion. (353-354b; 815-818b.)

Following up, Judge Davis spoke to his assembled employees and broached the subject.

He told them that he would try to sell the proposal to the counties if the employees agreed to give up part of their annual wage raise, their traditional Blue Cross health plan with a $2 co-pay, and longevity pay. The Court's employees were divided – some not liking one aspect of the proposal or another. At the end, however, they collectively authorized the judge to present the proposal to the counties, which he then did. (354b; 826-827b.)

Court Administrator Edel described these discussions with County representatives, and others that followed, as the equivalent of collective bargaining. (718b.) The proposal Judge Davis made to the Counties, as authorized by his employees, involved reductions in current employee benefits intended to offset in part the cost of new retirement benefits that would be granted in return. Specifically, the Trial Court would change its traditional Blue Cross Blue Shield plan to a Community PPO-1 plan, which limited an employee's choice of providers, and it would accept an increased drug co-pay (eventually set at $10) instead of the $2 drug rider then in effect.[34] (772b.) This change was expected to generate approximately $87,000 in annual premium savings. Of that savings, $50,000 would be deposited in the proposed retirement healthcare fund, and that total contribution – shared by the three Counties according to their allocation formula – would be increased by 4% each year. (353-355b.) The rest would be a savings for the three Counties' general funds. The annual longevity payments to employees that had been a fixture in most of the component courts would be frozen at the end of fiscal year 2000 and phased out over the next three years. Judge Davis also proposed a three-year agreement on wages for Court employees, calling for an overall 4% annual increase in each year, ½% of which would be deposited annually to build the retirement healthcare fund. (814-818b.)[35]

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[34] The co-pay has recently been increased again. Court employees' out-of-pocket costs are now $10 for generic drugs and $20 for name brand drugs.

[35] Appellants snipe at the 4% wage increase, though admitting it was agreed to for three years.

The Court's fiscal year 2001 budget proposal, which included the proposed benefit enhancements, was submitted to the Counties on July 13, 2000, and was discussed at Tri-County meetings held on July 17 and August 28, 2000. (1065-1067b; 821b.) At the Tri-County Committee's August 28, 2000 meeting (following the several discussions at prior meetings about the deal), consensus was reached both on an overall budget and on implementation of the benefit upgrades and accompanying concessions proposed by the Trial Court. Mr. Jack Crandall, the SCAO Regional Administrator who was facilitating the meeting, asked whether there were any questions or problems with the budget. When none were raised, Judge Davis said, "Well, good. Then we have a budget." (356b; 821b.) No one in attendance voiced disagreement.

The next agenda item was the two employee benefits, and again consensus was reached. An Otsego Commissioner spoke up in favor of the proposal, and "there was concurrence around the table... There were no objections." (822b.)

Crawford and Kalkaska have not disputed this account of a process that was consistent with the resolutions they had recently passed. Former Kalkaska Commissioners Nice and Green acknowledged at trial that the August 28 meeting resulted in apparent agreement. (1016-1017b, 1020-1022b.) Even Crawford Commissioner Pinkelman admitted to an agreement – she said she expected to see the agreed-on MERS benefit reflected in a written document. (890b.) Crawford Commissioner Hanson and Controller Compo agreed that they remained silent, but insisted that Crawford's full Board was free to begin reviewing the Court's budget proposal from square one. (893-895b, 968b.)[36]

The next day, August 29, 2000, the Crawford Board, acting in conformance with the

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(Brief, 12) Mr. Compo testified that he was "comfortable with" the average 4% wage increase, even in 2002. (951b.)

[36] Appellants' counsel, in his opening statement, would later claim that Crawford County Commissioners did not "object ... they just didn't express their feelings." (643-644b.)

August 28 consensus, passed two resolutions concerning the employee benefits upgrades. (1665a.) The resolution authorizing contributions to the retiree health fund read:

> MOTION by Hanson, second by Beardslee, to authorize the county pay 24% of $50,000. ($12,000) for the year 2000 and that payment will increase at 4% per year until 2017, and at that time will pay an estimated $94,649, and that the Blue Cross/Blue Shield medical supplement payment would be capped at the year 2000 at $4,087 [and] would increase at 4% per year until 2017 for an employee to be eligible for $7,654 per year. Roll call: Corlew – aye, Golnick – aye, Hanson – aye, Pinkelman – absent, Wieland – aye, Beardslee – aye, Motion carried.

The resolution authorizing implementation of the MERS B-4 upgrade read:

> MOTION by Wieland, second by Hanson, to request the Court not implement the MERS B4 upgrade at this time, but recognize the change in the 2001/2002 budget cycle. Ayes (5) five, nays (0) none, absent (1) one, Motion carried.

The MERS motion would later be distorted with the argument that to "recognize the change in the 2001/2002 budget" meant nothing, notwithstanding that Crawford had, according to Mr. Edel's minutes, made precisely the same comment at the June 29, 2000 tri-county meeting. Those minutes reflect initial acceptance of the budget which "included the new MERS and health plans." Crawford, however, asked the Court to "wait one year before implementing changes agreed upon, not to be implemented in current budget year." (1041b.)

On October 10, 2000, after hearing a presentation from Judge Davis and engaging in an extended discussion, Kalkaska's Board adopted a motion "to approve the benefit program for the courts as presented." (1069b.) After the meeting, Kalkaska Chairperson Zachary Cox signed the Agreement Judge Davis had presented. (360b.)

D. The Trial Court Entered Into Enforceable Contracts With Both Crawford and Kalkaska Counties To Fund Pension And Health Care Benefits At A Specific Level.

1. The Counties Had The Authority To Contract.

In this Court, Crawford and Kalkaska's threshold argument is that an enforceable obligation could not have arisen, under any circumstances, because no legislative body at any

level can ever bind its successor bodies. Appellants assert that this is hornbook law, even though they and their experienced municipal co-counsel never made the argument at the trial court level and consequently waived it. (200a-220a; 255a-269a.) More than that, both Crawford and Kalkaska expressly alleged in their initial pleadings that Counties and other funding units could enter into multi-year funding commitments by alleging:

> A multi-year funding commitment concerning personnel economic issues which exceeds the budgeted funding allocation by the individual funding units may only be entered into with the consent of each funding unit.
>
> (Crawford Counter-Complaint, 29b; Kalkaska's Third-Party Complaint, 90b.)

Appellants base their newfound argument on an expansive reading of this Court's decision in Studier v Michigan Public School Employees Retirement Board, 472 Mich 642; 698 NW2d 350 (2005). But Studier compels no such result. In fact, such a holding would hamstring the ability of counties to function. Studier dealt with a state statute and noted that there "is a strong presumption that statutes do not create contractual rights." 472 Mich at 661. "This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." Id.

To begin with, it is questionable whether this presumption holds with equal force, or at all, in the case of counties. Many Michigan counties are sparsely populated and have only a county government that meets the constitutional minimums. In Crawford, for instance, the Board of Commissioners must, and routinely does, enter into contracts. Crawford, like Kalkaska, has no executive officer dedicated to overall County operations; a Controller reporting to the Board is the closest thing to a county administrative officer. Thus, executive as well as legislative functions are necessarily carried out by the County's "legislative" branch.

If this reality alone does not "overcome this [otherwise] well-founded presumption" that underlies Studier, id. at 662, the circumstances under which the obligation at issue here were created should certainly be sufficient. All three funding units "legislatively" (i.e., by resolution) agreed to participate – indeed, partner – in the funding of court operations, including employee benefits. As we have seen, they had already agreed in prior resolutions to shoulder specified percentages of overall costs as part of this joint enterprise, and to agree to a unified yearly budget. This backdrop necessarily created expectations of commitments to be made and kept.

Furthermore, AO 1998-5, promulgated by this Court, contemplates multi-year commitments of the very kind at issue. See 46-48, infra. As that order directs, the Trial Court and its funding units met, discussed, and bargained on a give and take basis. A three year wage structure for the Court's non-union employees was unquestionably agreed to contemporaneously with the two benefits, and that agreement has not been challenged as beyond Appellants' powers to contract. (Brief, p. 12.)

Appellants made their written commitments to fund the benefits at issue for court employees only after they acquired full knowledge of the employee commitments that were being made in return. In fact, the unchallenged three-year commitment for an average 4% wage increase was plainly tied to one of the new benefits; i.e., 1/2% of that increase was specifically dedicated to help build up the retiree health care fund.

Not only that, but against this background, all three counties passed resolutions formalizing the commitments their tri-county representatives had made, though under AO 1998-5 this arguably was not even necessary.[37] The resolutions – like the discussions that preceded

[37] AO 1998-5 contemplates that binding agreements can be reached as long as funding units are given the opportunity to participate. A distinction that would make this principle applicable only to unionized settings would surely encourage wholesale unionization of court staffs.

them – are specific to the type of MERS benefit being granted and the amount to be contributed to the health care fund. There can be no question that under the unique circumstances of this case, which are so different from a legislature's passing a statute to declare a statewide policy, evidence of Appellants' intent "to bind" themselves was shown by "adequate expression." Studier, at 662.[38]

After all, how else could the three funding units in this case create a working court funding process, other than by meeting as they did in joint session, and then approving agreements, even by formal resolution? Do Appellants and their amici really want a rule of law that says they cannot, under any circumstances, enter into agreements that last beyond the term of the commission sitting at the time? Appellees think not, and believe moreover that Studier does not compel such an absurd and crippling result.[39]

Appellants also argue that the contracts Crawford and Kalkaska made are outside of their statutorily conferred powers, and thus beyond their authority to make. But MCL 45.3 states that each county has the power to, inter alia, "make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county." Const 1963, art 7, §34 provides that such powers are to be read broadly:

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[38] As this Court also noted in Studier, a "contractual relationship can arise" "implied in law"; for instance, once services are performed by county employees a contractual obligation to compensate them is implied in law. Id., at 669. Just so, in this instance, Crawford and Kalkaska could not accept the concessions made by the court's employees, retain them, and then renege on the promise they had made to provide specific compensation in return. See infra, at 56-57.

[39] The absurdity of the rule for which Appellants argue is highlighted by considering its implications for commitments a Board makes in an election year (like the commitments in this case), when a new Board will take office the following January. This seems not to trouble Appellants, who argue: "[F]rom noon on January 1, 2001 forward, . . . any purported contract to continue funding of augmented pensions for retiree health care for the 46th Circuit Unified Trial Court [and apparently most other contracts as well, the Trial Court would add] became inoperative and unenforceable, unless affirmatively accepted by the successor Boards of Commissioners." (Brief, p 51; emphasis added.)

> The provisions of this constitution and law concerning counties . . . shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.[40] (Emphasis added).

The legislature has by statute directed governmental funding units such as counties to appropriate funds for the operation of the circuit, district and probate courts that serve their citizens. See MCL 600.591(1) (circuit courts), MCL 600.837(1) (probate courts), and MCL 600.8271(1) (district courts).[41] These statutes also provide that the judges of the respective courts will have the power to set the compensation of the court's employees within appropriations.

Crawford and Kalkaska's argument that there is no specific statutory authorization for their actions with respect to the benefits draws on the interpretive principle of expressio unius est exclusio alterius. They cite Stowers v Wolodzko, 386 Mich 119, 133; 191 NW2d 355 (1971), and Hoste v Shanty Creek Management, Inc, 459 Mich 561, 569, n 7; 592 NW2d 360 (1999). Expressio unius has no application here. Appellants have not identified a particular statute that requires interpretation, let alone one whose ambiguity requires resort to maxims of construction. The expressio unius principle reasons that the legislature's enumeration of certain items in a particular statute means that it intended to omit other items of a like character that it did not name. Bradley v Saranac Bd of Ed, 455 Mich 285, 298-299; 565 NW2d 650 (1997). The directive of Const 1963, art 7, §34 that the powers of counties are to be liberally construed

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[40] The 1963 Convention Comment, reproduced in Michigan Compiled Laws Annotated, states:

> . . . Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes.

[41] These basic funding provisions of 1996 PA 374 were preserved although most of the act's other provisions were declared unconstitutional in Judicial Attorneys Ass'n v State of Michigan, 459 Mich 291; 586 NW2d 894 (1998).

discredits Appellants' argument that one must search through all legislative acts to find explicit authorization for the specific type of county contract at issue.

Thus, if a county deems it appropriate to enter into a multi-year contract with a court to provide a certain level of compensation, whether the subject is salary or fringe benefits, there is no constitutional or statutory bar to its doing so. Counties unquestionably have the authority to enter into multi-year collective bargaining agreements with their own employees, and courts similarly have authority to enter into such agreements with their employees.[42] Hence, it is appropriate for counties and courts to enter into multi-year agreements to provide specified compensation or fringe benefits. The Legislature's passage of 1996 PA 374 demonstrated that it sees nothing out of the ordinary about such contracts. See former MCL 600.591, particularly subsections (8) and (9). 1996 PA 374 was declared largely unconstitutional in Judicial Attorneys Ass'n, but this Court's focus in that case was on the definition of the employer (the Court or the County), not on the binding nature of employment agreements, presumptively lasting for multiple years, which MCL 600.591(9) sanctioned. As Justice Taylor (who viewed joint employer status as not inherently violative of the separation of powers doctrine) pointed out in dissent, there should be nothing wrong with agreements respecting employee pay and benefits between a court and a county that are working to harmonize on such matters. The constitutional separation of powers would be violated only if the county overstepped its bounds by attempting to control the court's employees. Id., 459 Mich at 312-316.

AO 1998-5 makes the same point. Section II, "Court Budgeting," contemplates that a chief judge, with the agreement of the funding unit, may "enter into a multiple-year commitment

[42] The employees of the Trial Court's District Division who work in Crawford County have entered into several multi-year labor agreements with the Court, for example Attachment 1, and the funding units have participated in negotiating those agreements.

[to employees] concerning any personnel economic issue [if] (1) the funding unit agrees, or (2) the agreement does not exceed the percentage increase or the duration of a multiple-year contract that the funding unit has negotiated for its employees." (Emphasis added.)

Crawford and Kalkaska, on the other hand, cite repeatedly to Potter v Hazel Park, 169 Mich App 714, 722-23; 426 NW2d 789 (1988), which invalidated the long term employment contract of a City Manager, holding it did not bind a successor City Council "since it takes away the governmental or legislative power of the incoming council to appoint and remove public officers."[43] (Emphasis added). But Potter also observed that the rule does not apply to contracts relating to business affairs. Id. at 720-721.[44] Here, Crawford and Kalkaska's agreement to appropriate a modest, fixed amount annually to the retiree health fund does not involve any public official's term of employment, or any matter requiring unfettered legislative discretion. It is a business-type commitment to create a fund that will benefit retired employees of the Court, and the Trial Court has acknowledged that the obligation to fund is not perpetual.

The Court of Appeals majority cited Harbor Land Co v Township of Grosse Ile, 22 Mich App 192; 177 NW2d 176 (1970) as precedent that a public body may make a contract that binds a successor board. In Harbor Land, the Township Board contracted with plaintiff for construction of a sewage treatment facility, and promised that the Township would require users to pay a tap-in fee to the plaintiff; a successor Board rescinded this resolution nine years later. The Court of Appeals held that a township can make long term contracts in the exercise of its

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[43] Willoughby v Village of Dexter, 709 F Supp 781 (ED Mich 1989), rejecting a discharged city manager's wrongful discharge claim, is a similarly limited holding.

[44] The Court cited 56 Am Jur 2d, Municipal Corporations §154, pp 206-208, and 10A McQuillin, Municipal Corporations, §29.101, p 44 (3rd ed 1990 rev.)

business or proprietary powers and that the contract did not deprive the successor Board of its legislative discretion.[45]

Crawford and Kalkaska argue that the funding of court operations is "clearly not" on the "business or proprietary" side of this distinction. But making a contract with the Court that certain wages and benefits will be provided for its employees falls within the day-to-day business operations of funding units. As Crawford and Kalkaska observe, the Trial Court's employees are not county employees, but employees of the Court. There is no need for Appellants to preserve "discretion"; they retain the overall control of appropriations, subject to the inherent powers doctrine. Judicial Attorneys Ass'n, supra. AO 1998-5 protects them against abuses and excesses.[46]

If Crawford and Kalkaska's sweeping definition of the "successor Board" doctrine is the law, doing business with the government would be a trap for the unwary, and businesses and individuals alike would and should avoid such dealings. The Court of Appeals found Appellants' position to be virtually incredible, noting the existence of "many administrative functions that must be handled on a day-to-day basis that may require contracts lasting longer than the normal term of office. If a successor board had the power to repudiate these types of contracts at will, a government entity's ability to do business would be compromised." 46th Circuit Trial Court II, 266 Mich App at 162.

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[45] The Court of Appeals quoted approvingly from Plant Food Co v City of Charlotte, 214 NC 518; 199 SE 712 (1938): "The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired." Id. at 205, fn 4 (emphasis added).

[46] See also, Greenawalt v Sun City West Fire District, 250 F Supp 2d 1200, 1211 (D Ariz 2003) (successor board doctrine did not preclude board from entering contract with firefighter extending beyond the term of the board; doctrine applied only to employment contracts involving personal services performed for the successor board). Moreover, the Counties overstate the rigidity of the distinction between proprietary and governmental activities in this context. According to Osborne, Local Government (2nd ed 1992), p 154, it is a "rule of thumb."

2. Administrative Order 1998-5 And The Context Of The Parties' Contracting.

There should be no question that Michigan's constitutional blueprint authorizes agreements like those before the Court to be made and enforced. The history of this Court's efforts to create an environment that fosters judicial-legislative cooperation makes that abundantly clear. The Legislature adopted 1996 PA 374 to address court funding. Initially the Legislature designated the courts and funding units as "joint employers," but went on to authorize the establishment of a binding judicial council. If there was no council, the funding unit became the employer, with the authority to establish 'compensation, fringe benefits, pensions' and the like. 1996 PA 374, Sections III and IV.

Not surprisingly, a constitutional challenge was begun in Wayne County Circuit Court, culminating in Judicial Attorneys Association v State of Michigan, 459 Mich 291; 586 NW2d 894 (1998). But before that case reached this Court, the Court had to deal administratively with funding issues that had been addressed by the statute, treading delicately because the constitutionality of the statute was certain to reach the Court. The result was Administrative Order 1997-6, the predecessor to AO 1998-5. In a lengthy preamble, the Court noted:

> Given the separate responsibilities of the judiciary and the court's funding units, the application of the principle of separation of powers to the operation of trial courts requires a practical reconciliation of the separate constitutional spheres of the legislative and judicial branches where those spheres intersect. Upon the judiciary rests the responsibility to determine what is reasonable and necessary to administer the courts. With that responsibility comes not only the necessity of prudent, efficient management, but also a burden of persuasion with those who must fund the courts. Lack of cooperation and poor communication between chief judges and representatives of local funding units can produce barriers to optimal court operations, and can lead to costly litigation to resolve funding disputes.

Appellees understand that, prior to the issuance of AO 1997-6, this Court solicited public input. Amicus MAC, representing Michigan counties, was a major player in these discussions, and, ironically, MAC's chief spokesperson was Peter Cohl, senior partner in the firm that represented Appellants throughout this litigation.

While this Court had the Judicial Attorneys case under consideration, it became clear that the constitutionality of 1996 PA 374 was in doubt, and that trial courts and funding units would require renewed guidance if the legislation were declared unconstitutional. The court funding process would, of course, have to go on. Again, this Court did not act unilaterally. Instead, the undersigned are advised that Mr. Cohl, representing MAC, again took part in negotiations that shaped AO 1998-5, which was issued contemporaneously with the decision in Judicial Attorneys Ass'n[47] 495 Mich at 307.

The Trial Court has previously examined AO 1998-5 and referenced its provisions (section II) that contemplate multi-year commitments of the very type made here. The Trial Court followed the guidance this Court provided, and in fact both the Court and the funding units felt obligated to act in accordance with it.

In Judicial Attorneys Ass'n, supra, Justice Taylor approvingly quoted from then Judge Markman's dissent. Justice Taylor and Judge Markman both felt that joint employer status of court employees did not necessarily violate the separation of powers doctrine. While their view did not prevail, it provides an instructive example of how courts and their funding units could have cooperated without violating the constitutional principle in creating binding commitments on court employee benefits and, thus, court funding:

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[47] Until the appearance of co-counsel Falk on the scene, Appellants never challenged the viability of 1998-5, and Appellants' counsel claimed at trial that Appellants had acted in accordance with it. (644b.)

> The county and the chief judge are separately represented, but as each issue for negotiation arises, these agents confer and reach accord regarding the position to be taken.
>
> Id., at 315.

This is precisely what was done in this case.

In sum, this Court has long recognized the propriety of collective bargaining between trial courts, unions and funding units. Clearly it did not intend in AO 1998-5 to disadvantage courts whose employees are not unionized by subjecting those courts and their employees to the vagaries of legislative terms, a problem heightened in multi-county courts whose funding units have differing fiscal years. Accepting Appellants' argument would cause destabilization of labor relations in consolidated courts and create a preference for unionization within these units.

E. The Specifics Of The Retiree Benefits That Crawford And Kalkaska Agreed To Fund.

Up to this point, Appellees have addressed Appellants' capacity to contract – an issue only implicitly raised by this Court's articulation of Issue III, but nonetheless the central piece of Appellants' contract argument.

Appellees have already detailed many of the facts that illuminate this issue – the process by which the two benefits were described to all three funding units during the joint meetings held for this purpose, the quid pro quo of employee concessions which Judge Davis discussed with the employees and then with the county representatives, and the agreement of Kalkaska and Crawford to fund the specific benefits, initially by commitments made in the Tri-County Committee setting, and then by resolution.[48]

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[48] Otsego agreed as well and has maintained its agreement throughout this litigation. Otsego is, of course, the largest contributor by far to the shared costs for the Trial Court's operation, as well as the control unit.

There can be no question that all of the parties understood what Chief Judge Davis had bargained for on behalf of the Court's employees: a MERS B-4 benefit and funding of a limited (capped) health care supplement. Appellees will nevertheless highlight here the specific record evidence which demonstrates that the bargain was fully understood by everyone. Appellees will also comment on the instructive nature of the defenses raised by Appellants as the case was being tried.[49]

1. The Two Benefits – What They Are

MERS is a state-sponsored retirement system that was very familiar to the three funding units. Each county had county employees enrolled in the MERS system. Indeed, each county had a MERS B-4 level benefit for some employees by the time the case was tried.[50] Crawford and Kalkaska have never contended, and do not contend now, that they did not understand what level of benefit a MERS B-4, F 55/20, FAC-5 entailed. They have only claimed that they were not aware of what MERS would eventually bill them when they agreed to the benefit.

While MERS computes the cost of funding pension benefits for each of its participating groups annually – in this instance, on behalf of Otsego as control unit – the increased cost of the Trial Court's MERS B-4 benefit eventually turned out to be $105,000 annually for all three funding units, with 27% of that, or approximately $28,250, attributable to Crawford County,

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[49] As noted supra at 37, the counties' capacity to contract was not disputed at the trial court level – instead it was admitted.

[50] The benefit essentially provides for a multiplier of 2.5 percent of for each year of credited service. Variations in the benefit include the age at which an employee can retire, the years used to calculate the average salary multiplier, e.g., 3 or 5; and the minimum number of years of employment required before one can retire. In this instance, the MERS benefit was precisely described as B-4, F 55/20, FAC-5. Each county had experience with such configurations. (1254-1255b.) An E-2 rider providing for automatic cost-of-living adjustments was initially approved, but was not implemented by Otsego County. (237b.)

though the net cost of both benefits, taking into account the savings generated by employee give-backs, was only $12,960 annually for Crawford in 2003.[51]

In Appellants' Brief, they attempt to make a curious point: that even if a MERS B-4 benefit had been agreed to, it was not clear that it had been agreed to retroactively, i.e. to cover an employee's prior years of service.

While Crawford has consistently argued that it made no agreement to implement the MERS B-4 benefit, and Crawford and Kalkaska argue in this Court that they did not have the power to make such an agreement, this is the first time Appellants have added the latest twist: that they might have agreed, but not to retroactivity. In the lower courts, Appellants always contended that they did not agree to the B-4[52] and would not have agreed, precisely because making the benefit "retroactive" would have been too costly. For instance, Appellants admitted at pages 27-28 of their July 2003 Post-Trial Brief in the circuit court, that the Trial Court intended all employees' prior service to be credited, and that this added significant "unfunded liabilities." (1375-1376a.) But unfunded liabilities do not exist unless the benefit is granted retroactively, and such retroactive increases are the rule, not the exception, when a MERS benefit is increased in public employment. (1012b; 1121b-1122b.) In fact, Appellants went on to say in their Post-Trial Brief that if court employees paid for the cost of a "prior service credit," that would have been a major step toward achieving a budget that Appellants would have

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[51] The cost of funding a MERS benefit undergoes minor adjustment from year to year; since 2002 – when MERS first billed Otsego County for the new group of court employees – the percentage rate used to calculate the employer contribution has declined from 16.42% to 15.74%. The true net cost would be further reduced by certain state reimbursements for personnel expenditures.

[52] Kalkaska, of course, did agree by passing a resolution approving the Trial Court's proposal. Kalkaska has since played the role of silent partner while Appellants' Briefs emphasize events in Crawford County.

accepted. (1396a.) Thus, while the issue whether agreement was reached on the B-4 benefit is fairly before this Court, the question of retroactivity is not.

While there was no confusion over the nature and identity of the MERS benefit, Crawford purported to be uncertain about the nature of the retiree health care supplement, notwithstanding its specific and detailed resolution that defined the funding commitment. In order to be able to argue that its commitment to fund the health care benefit had not been made, or had been improvidently given, Crawford eventually claimed the benefit to be an open-ended insurance commitment with potential unfunded liabilities of millions of dollars.

But the fund was never intended to be anything other than a limited, "capped," source of benefit to the extent money was available to make payments. Crawford's obligation, as specifically set forth in its August 29, 2000 resolution, provided for an annual payment of $12,000, to increase by 4% each year. (525a.)

The spectre of unfunded liabilities was first raised by Crawford's counsel in late October 2000, with the alarmist notion that Crawford would owe millions on account of such obligations. While the MERS benefit was scarcely discussed, counsel's argument on the health fund took the forefront and eventually became the only subject of the mediation that occurred pursuant to AO 1998-5 in June 2001. (392-396b.)

How this after-the-fact generated confusion could have been advanced as an argument is puzzling – the only possible explanation being that an excuse for non-performance was sought and then manufactured. After all, there was no question by then that the employees were the responsibility of the court, and that the counties' obligation was limited to clearly defined funding, which also did not run directly to the court's employees.[53] The specious nature of

[53] In fact, Appellants so argued in their Application for Leave to Appeal, contending that they

Crawford's (and its counsel's) argument became quite clear to the trier of fact. Judge Davis averred that he always intended the benefit to involve no more than a capped fund. 358-359b.) He made this quite clear by offering specific language that provided:

> If at any time the medical benefit fund becomes insolvent in an amount that cannot be remedied by the good faith effort of both parties to do so then, in that event, the medical portion of this contract shall expire and the fund will cease its existence. (1693a.)

Crawford Commissioner Pinkelman, testifying for Appellants, acknowledged that according to Judge Davis this benefit involved a limited payment that was going to be put into a fund, that the county had a limited obligation which was capped – i.e., that the resolution so provided, and that her concern had focused on what the county's limited annual funding obligation would be. (887-889b.) By the time she voted in support of the resolution which called for funding of the benefit, she was comfortable that she was voting for a limited obligation, without unfunded liabilities. (889b.)

Both of Appellants' experts, its CPA (Mr. Henderson) and its consultant (Mr. Todd) testified that if a capped fund was contemplated, there would be no reason to be concerned over unfunded liabilities. (907-909b; 1009-1010b.) Judge Kolenda found, based on this uncontroverted evidence, that what had been intended and provided for was a limited (capped) fund with respect to which a concern over unfunded liabilities need not exist.[54]

Crawford's conduct underscored that the concerns Crawford purported to express were not being honestly stated. While the Chief Judge had discussed with Crawford his plan as to

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were "constitutionally barred from negotiating with judicial employees" and that the funds they appropriated could be "expended however the plaintiff court chooses." (Application, p 34.)

[54] Crawford also pointed to language in the plan that gave the chief judge the discretion to amend the benefit (but not the funding). (307b.) Crawford's expert acknowledged that this language was appropriate to avoid arguments by beneficiaries that the benefit was unalterable (1014-1015b.)

what level of supplemental payments might be made on behalf of the retirees from the fund, a figure eventually expressed as about $5,700 annually, this was not a county concern. Their concern, as already noted, was limited to the question of funding, while the determination of the employee benefit was entirely within the Chief Judge's prerogative. AO 1998-5, section II.

But Crawford went so far as to accuse the Court of fraud as a result of a mistake Mr. Edel made in calculating what might initially be paid out to retirees on an annual basis. (35-36b.) The trial judge granted summary judgment on this claim of misrepresentation in light of evidence showing that Crawford did not rely on the mistaken figure but instead constructed a set-up that the Court had made an inadvertent mistake. As Crawford's Controller later wrote, the Board said nothing about the mistaken figure because they wanted to provoke a reaction and "call the Trial Court's bluff." (45a.) Kalkaska joined in, asserting a baseless claim of fraud against the Trial Court, even though it could in no way assert that it had been given the wrong payout number. (87-121b.) Judge Kolenda not only dismissed the misrepresentation claims on motion, but imposed sanctions against Crawford's lawyers.

While that ruling is not before this Court, it provides appropriate focus on the nature of the arguments Crawford made to claim that it did not know what it was agreeing to when it passed its resolution concerning retiree health care on August 29, 2000. After all, a claim of misrepresentation requires reliance leading to mistaken agreement – an agreement Appellants at the same time deny. There can be no question that both Crawford and Kalkaska knew what they had agreed to – in terms of the nature of the benefit, and in terms of what they would be funding: a well known and specifically defined pension benefit, and an annual contribution towards a fixed fund from which limited payments could be made by the Court towards retiree health care costs.

2. Appellants' Trial Level Defenses To Avoid The Agreements They made

a. Misrepresentation

As already noted, Appellants' principal defense below – not before this Court now – was the claim that they had been defrauded into agreeing to the benefits – in other words, they claimed they made agreements because they relied on certain representations. Appellants' argument here that they never agreed is certainly undermined by their initial assertion that they agreed only because the facts were misrepresented to them.

b. The Asserted Need For A Writing

Appellants' next line of defense was that they intended for their agreement to be set forth in a contract to be signed by all funding units, and that Crawford's failure to sign such a contract meant that no agreement was created. Both Otsego and Kalkaska did, of course, execute a document that essentially detailed the court's plan with respect to the administration of the health care fund. (291-310b.)

Judge Kolenda found, based on his evaluation of the evidence and the credibility of the witnesses before him, that it was not intended that the agreement be reduced to writing, in order for it to be binding. (73a.) The record amply supported this finding.

Kalkaska signed the contract, but belatedly claimed that it did so only on condition that Crawford also sign. This contention was absolutely false. Kalkaska considered the benefits during two meetings, the first on September 12, 2000, the other on October 10, 2000. During the September 12 meeting, the issue was essentially tabled, but the agreement was ratified, by resolution, during the second meeting on October 10. (1157a, 1238a.)

Significantly, Kalkaska knew when it passed its resolution agreeing to fund the benefits that Crawford would <u>not</u> be signing the document Judge Davis had prepared. The minutes of the

September 12, 2000 meeting recount: "[Commissioner] Sherman spoke on the meeting with Rudi Edel and the contract with the court. Sherman informed the Board that Crawford will not be signing the contract". (1157a.) Because Kalkaska approved funding the benefits in October, at the same meeting where it approved the September 12 minutes, it is scarcely in a position to argue that it did so believing that Crawford would be signing the document. This inconsistency no doubt contributed to Judge Kolenda's finding that Commissioners "testified to what they have convinced themselves, or have been convinced, happened and was intended," and that Kalkaska's resolution was not conditioned on the signing of a document. (38a.) Neither Kalkaska's resolutions nor Crawford's said so. Nor, for that matter, did Otsego's.

No county commissioner who testified on this issue could articulate a meaningful basis for contending that a written agreement was required. In fact, their theme that they wanted confirmed what had been "agreed to" or "approved" merely underscored that an agreement had already been reached. (890b, 892b, 1650a.)

It was undisputed, on the other hand, that Judge Davis was the one who recommended preparation of a writing, and that he did so for the purpose of informing the Court's employees. (824b; 1016-1017b.) Other witnesses confirmed that, for instance, an agreement to change from one MERS level to another typically does not involve a written agreement, but instead a resolution which authorizes MERS to proceed, as occurred here. (861-862b.) Crawford and Kalkaska's transfer of MERS assets to Otsego in July and August 2001, respectively, for the purpose of effecting this change was fully consistent with the agreed-on undertaking to have the B-4 benefit put in place and funded.[55]

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[55] Appellants transferred assets corresponding to those court employees who were then part of their county MERS plans. Earlier in 2002, the employees who had participated in the SEP plan as a result of their employment with the 87th District Court executed consents to transfer the

The Counties argue that the "rule" of Young v. Wallace, 327 Mich 395, 403; 41 NW2d 904 (1950), indicates a writing was required. Young does not help them. That case rejected the argument of one signatory that a business agreement was not effective between two parties until a third party named therein joined in its execution. This Court held that nothing in the agreement indicated the third party's signature was to be a condition precedent, and that the burden of proof is on a signatory to a several party contract to show that "he was not to be bound until the instrument had been executed by all those named." Id. at 403.

Judge Kolenda found as fact that the Counties had not carried this burden of proof. He thoroughly reviewed contemporaneous documents and expert testimony, plus the testimony of those Crawford and Kalkaska commissioners who testified at trial on this issue. He found their testimony that a writing signed by all three counties was a condition to implementation of the benefits agreement, which is nowhere expressed, to be unpersuasive in light of all the facts. (71a.) That finding of fact is entitled to special deference, turning as it does upon the credibility of witnesses whom the judge had seen testify and upon a myriad of historical facts. Hawkins v Smithson, 181 Mich App 649, 651-652; 449 NW2d 676 (1989).

To summarize, neither Kalkaska nor Crawford ever contended below that they did not understand what they had agreed to with respect to the MERS B-4 benefit. It was only the retiree health care fund that inexplicably generated controversy at later meetings (including mediation) about what was intended, and that because Crawford had become fixated on the false issue of "unfunded liabilities." And Kalkaska, of course, could make no argument of uncertainty

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assets in their respective SEP accounts to MERS, if they wished to obtain credit for prior years of service. The employees had the option of leaving their assets in the SEP and beginning their MERS seniority at January 1, 2001.

as to either benefit in light of the fact that it signed the agreement at the time it passed its resolution.

c. Crawford's Resolution Concerning The B-4 Upgrade

As its last line of defense, Crawford argued that its seemingly clear resolution to not "implement the MERS B-4 upgrade at this time, but to recognize the change in the 2001/2002 budget cycle," meant nothing – that it was merely an expression of intent to "consider" funding such a benefit at some future time. Given the background of the discussion, this position was unsustainable, as Judge Kolenda found.

To "recognize" the benefit later, modified by the earlier statement "not [to] implement" it presently, can mean nothing other than a restatement of the position Crawford took during the June 19, 2000 tri-county meeting. There the benefits were initially agreed to, but Crawford requested that the Court "wait one year before implementing changes agreed upon." (1042b, ¶12.) Crawford's effort to turn the phraseology "not implement" now but "recognize" later into "consider whether to approve at a later point" is far too strained. Even Chairperson Corlew admitted at her deposition that the resolution appeared to be an expression of approval. (200-202b.) The resolution is unambiguous, as Judge Kolenda held, and must be given its plain meaning. Tavener v Elk Rural Agricultural School Dist, 341 Mich 244, 251; 67 NW2d 136 (1954).

There can be no question that Crawford and Kalkaska joined Otsego in agreeing to the precise benefits that Judge Kolenda found had been agreed to, and to provide the necessary funding – in the case of MERS to be determined by MERS in the customary way, and in the case of the health care fund to make a precisely delineated annual contribution.

The duration of this funding commitment is, of course, another matter. While Appellants trumpet the spectre of indefinite, if not perpetual, commitments, this is not at all what the Trial Court has contended. As it acknowledged during argument in the Court of Appeals, and as AO 1998-5 contemplates, a multi-year funding commitment should not exceed the timeframe customarily utilized by the funding units for commitments made to their employees. That time has now expired, mooting this issue. Indeed, the Court has met with all three funding units to discuss its budgets for the years following Judge Kolenda's ruling on funding – which did not extend beyond budget year 2003. For years 2005 and 2006, the parties returned to a partnership as initially contemplated, and discussed the merits of budget proposals on a give-and-take basis. Nothing precludes the cost of these benefits being a subject of discussion in this setting.[56]

F. The Trial Court Properly Found An Implied-In-Law Contract To Provide The Benefits.

A contract between the Trial Court and Appellants can be placed on an entirely different legal footing, even if an express contract is held not to exist. Judge Kolenda found, after trial, that the concessions made by the Trial Court's employees could be viewed as creating a contract implied in law as well:[57]

> There is a contract which may now be enforced, even if there was some inadequacy in the [offer, acceptance or execution] because all three counties have all accepted to their benefit performance by the employees which was, and remain, to their detriment.

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[56] For instance, the parties could discuss reasonable employee contributions towards the cost of the MERS benefit, as occurred in Crawford in early 2003 when Crawford agreed to implement for its deputies a MERS B-4 with an employee contribution, but also a larger annual wage increase to offset the cost of that contribution. (1119-1126b.) In 2006, through constructive budget negotiations, the court and all three counties agreed to a change in the Court's health care benefit for active employees that substituted a less costly $10/40 drug card (with reimbursement to $20) for the $10 drug card instituted in 2001. In addition, all Court employees are now paying $25 per month toward the premium of the PPO-1 health policy.

[57] The Court of Appeals did not formally reach this alternative argument, yet seemed to approve it. 46th Circuit Trial Court II, 266 Mich App at 162, n 20.

> After the counties adopted resolutions approving of the Trial Court's proposal regarding retiree healthcare and a pension upgrade, all the employees of the Trial Court were held to the concessions given by them in return for those retirement enhancements. At a substantial savings to the counties, the employees started paying much more for their prescription medications, endured the lesser benefits and disruptions of a less costly healthcare program, phased out their traditional longevity pay, and started contributing a share of their wage increases to the retiree healthcare fund. Obviously, those concessions work to the detriment of the employees and benefit the counties. (73a.)

This Court recognized in Studier that "an implied-in-law contractual relationship can arise by virtue of a legislative act." There, MCL 38.1303(a)(1) defined public school employees' compensation as "remuneration earned by a member for service performed as a public school employee." The Court held there, however, that no implied-in-law contract had arisen because the items of "remuneration" enumerated by the Legislature did not include the health care scheme to which the plaintiffs claimed to be entitled. Studier, 472 Mich at 667.

Here, to the extent "legislative" enactments – the Crawford and Kalkaska resolutions – are relied on, they specifically and unambiguously point to the benefits. The law will imply a contract under such circumstances because it will not permit precisely what Crawford and Kalkaska attempted to do here: receive the benefits of a transaction and then, after receiving the other party's performance, assert a defense that might preclude a contract, in order to avoid paying their part of the bargain. Judge Kolenda agreed: that "would be fundamentally unfair because it would permit unjust enrichment. Barber v SMH (US), Inc, 202 Mich App 366-375; 509 NW2d 791 (1993)." (74a.) See also, Moll v Wayne County, 332 Mich 274; 50 NW2d 881 (1952).

The Trial Court's employees gave up benefits that they had earned, as well as future pay, in return for the retirement benefits. Longevity pay had built up over the years (it involved an

annual payment based on years of service), and if the employees had not agreed to phase it out each employee's payment would have continued to grow, year by year. Additionally, the employees were promised, with the Counties' concurrence, an average 4% wage increase, but one-half percent was dedicated as an additional payment to help build the retiree health care fund. That portion was not folded into individual employees' base pay, and it never will be.

AO 1998-5 directs the Chief Judge to communicate with the funding units about the costs of running the Court, which of course include employee benefits. As already explained, Chief Judge Davis did so, and offered the funding units the concessions the employees were willing to make in return for funding the two benefits. Allowing Appellants to retain those concessions under these circumstances would violate fundamental fairness.

G. Appellants' Argument That Any Contract Between Them And The 46th Circuit Trial Court Was The Product Of A Violation Of MRPC 4.2 Is Preposterous.

Repeating a now tiresome pattern, Appellants close their brief by advancing yet another argument not made in the lower courts: For Judge Davis or the Court's administrators to talk budgeting with the Crawford and Kalkaska Boards violated MRPC 4.2 and made any resulting contract unconscionable and unenforceable. And once again, Appellants are too clever by half.

MRPC 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. (Emphasis added.)

Appellants' argument is absurd. Judge Davis was not "representing a client" when he discussed court budgeting with Appellants' Boards of Commissioners. He was part of the judicial branch, dealing directly with the legislative branch in a routine annual exercise in Michigan's eighty-three counties. AO 1998-5 does not require courts to deal with their funding

units through counsel when trying to reach agreement on an appropriated annual budget. See AO 1998-5, sections II, IV, V, and VIII. To encumber communications between courts and their funding units in this fashion would undermine the cooperative relationships this Court has encouraged, not to mention generating needless expense.[58] The presumptively adversarial view of budgeting that Appellants so predictably advocate is inconsistent with both the letter and spirit of AO 1998-5.

III. THE EVIDENCE SUPPORTED THE TRIAL COURT'S CONCLUSION THAT THE TWO BENEFITS WERE REASONABLE AND NECESSARY TO AVERT DAMAGE TO EMPLOYEE MORALE THAT WOULD HAVE INTERFERED WITH THE COURT'S FULFILLING ITS CONSTITUTIONAL AND STATUTORY OBLIGATIONS.

A. Standard Of Review.

The standard of review applicable to this issue with constitutional dimensions is identical to the standard of review set forth with respect to Issue I at 12-14, supra.

B. Considerations Of Employee Morale May Warrant Invoking The Inherent Powers Doctrine, And The Evidence Here Was Sufficient To Do So.

Returning to the second question this Court has posed, the Trial Court's answer focuses exclusively on the issue of employee morale. As has been pointed out, the Court's argument grows out of the negotiation process among the Trial Court's employees, the Court and the funding units – a process betrayed when Crawford, and later Kalkaska, reneged on their enacted funding commitments. As Judge Zahra implicitly recognized in the Court of Appeals, 266 Mich App at 185 n. 3, those funding commitments need not be enforceable contracts in order to support the conclusion that funding of the benefits was constitutionally mandated. Despite their desperate scramble to raise a host of belated defenses, there can be no doubt that Appellants

[58] If anything, this argument is an unfortunate reminder of Appellants' actions in earlier years that thwarted the cooperative process required to make their partnership with the Court work.

made commitments and that their refusal to fund these benefits would have devastated employee morale to a degree that would have impaired the court's ability to perform its mandated functions, but for Judge Kolenda's order.[59]

As detailed infra, several witnesses testified to honestly held beliefs that this logical result would in fact follow. Appellants belittle these opinions as conclusionary and of no value, but their argument unwittingly concedes the objective basis for the trial judge's finding that not only employee morale, but the functioning of the Court, was seriously imperiled.

Appellants correctly describe 17th District Probate Court v Gladwin Co Bd of Comm'rs, supra, as establishing that employee morale concerns "may warrant invoking the 'inherent powers' doctrine." (Brief, p. 35.) Appellants write that in Gladwin the morale issue "was not subjectively determined based on an unfulfilled and legally unauthorized promise, but objectively grounded in an arbitrary and irrational wage structure whereby judicial employees with college degrees were paid the same as those with high school education or less, without regard to position or job responsibility." (Id., emphasis in original.) In seeking to thus distinguish Gladwin from the instant case, Appellants in fact acknowledge a strong parallel.

The record establishes that the employees' concerns here involved far more than a bare desire for better compensation. They were based on agreements reached, and then conveyed to them, after they had been consulted and had agreed to make concessions. It is undisputed that they gave up significant benefits, which then inured to the benefit of the counties, who retained those savings. Crawford and Kalkaska appear to insist that all this means nothing.

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[59] Judge Zahra's basic premise was, of course, correct: if provision of the two benefits was constitutionally mandated from the outset, then a later contract to the same effect could not be supported by consideration, let alone be necessary. But the benefits were not initially compelled – they became reasonable and necessary only because of Appellants' earlier, contractually based commitments. The Trial Court pled these theories in the alternative, and a determination in the Trial Court's favor on either theory is sufficient.

In the Gladwin case, the court's expert, O. William Rye, opined that the compensation structure imposed by the county – which paid the same for most employees regardless of position or responsibility – was "irrational." He further opined that such an irrational salary structure "over a period of time will create employee dissatisfaction and that employee dissatisfaction will affect employee performance and productivity." Gladwin, 155 Mich App at 455.

It cannot be contended that an irrational salary structure is more unfair and will create greater employee dissatisfaction than a broken deal made with employees to give up some benefits for others, ending with Crawford and Kalkaska keeping the employees' concessions and not providing the quid pro quo. Over time both circumstances will adversely affect employee "performance and productivity." While common sense compels this conclusion, supporting testimony was also provided.

Judge Barry Howard, prior to becoming a Circuit Judge, had been a practicing labor lawyer representing major unions in collective bargaining with public employers. (834b.) After observing that Judge Davis had gone through the channels required of him and obtained the consents of the funding units, he opined that if the benefits were not provided (or were "taken away"),

> [I]t would have been disastrous. It would have been disastrous in that Judge Davis as the Chief Judge obtained concessions to get these benefits. It would have been disastrous in terms of morale. It would have been disastrous in terms of the future going forth of what was really a new project, and he did exactly the right thing and what I would have done as chief judge to maintain the integrity of the court and the process of complying with the requirements of the Supreme Court in getting this unified program started". (845b.)

Court Administrator Edel observed that employee morale "plummeted" after Crawford balked at living up to its agreement in 2000, and testified that if the benefits were denied "the morale would be seriously affected, which in turn would affect, in my opinion, the efficiency of the court operation." He provided a recent example of employees having been agitated by a comment by a County Controller. (680, 738-739b.)[60] Judge Davis, who had recently met with the employees to calm them down about this very issue,[61] confirmed:

> They have soldiered on very well. But their mood is not good. They are apprehensive. They are under pressure. They are distracted. We don't have the esprit de corps and the excitement of generating new ideas and finding better ways to do things that we had prior to this brawl that we're involved in now . . . . So it's been very hard on the employees. (829-830b.)

Last, Crawford Probate Register Linda Franklin testified:

> It would be terribly demoralizing for the employees, because we . . . have already given up benefits in order to have these be in place. And we have every reason to believe that they were in place and that they will continue to be in place. To have – to have that taken away from the employees at this stage three years later after we've already made the contributions and assumed that it was a done deal would be very demoralizing and disappointing. (876b.)

Ms. Franklin continued by affirming that such a development would cause turnover and adversely affect productivity:

> . . . [I]t would affect our ability to deal with the public on a daily basis when morale is lessened and your motivation is no longer there, and you may be out looking for another job that is going to

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[60] Mr. Edel testified about morale over objection by Appellants' counsel, who claimed that morale was not an issue. (737b.) The court overruled this objection, after argument by Appellees' counsel, holding that under Gladwin County morale certainly could be an issue and the court should hear the evidence and sort it out later. (738b.) This should put to rest Appellants' snide charge that the "morale theory" was "an afterthought," "helpfully suggested by Judge Kolenda". (Brief, p. 31.)

[61] The Kalkaska Controller had remarked (with no foundation) that the Court might make a deal that would preserve the benefits only for top echelon employees.

> give you some more benefits. It's going to affect the way that we're able to deal with the public." (876b.)

Appellants point to testimony that the morale of the Court's employees, prior to the time they received word that the two Counties were trying to renege on their agreement, was "excellent." (Brief, p. 31.) But they are again attacking a straw man. As previously noted, the Court does not contend that a pre-existing employee morale problem, or the Court's inability to hire and retain competent employees, had reached a level that would require implementation of these benefits – although such considerations did play a role in Judge Davis's decision to seek the benefits. Instead, the morale considerations that made these benefits reasonable and necessary rose to that level only because Crawford and Kalkaska made a commitment, asked for and received consideration for the commitment, pocketed those savings, and then attempted to renege.

To be sure, this element of establishing that benefits are reasonable and necessary must be cautiously approached. But the circumstances of this case are so compelling – and, hopefully, so unique – that amici's professed concern that arguments based on morale considerations could lead to abuse is unfounded. As Judge Zahra noted in his concurrence on this issue, unique circumstances converged to make application of the constitutional inherent powers principle appropriate here. 46th Circuit Trial Court II, supra, 266 Mich App 185 at n 3.

C. Appellants Seek Relief That Is Impossible Or Impracticable.

In a single paragraph (Brief, p 61), Appellants magnanimously suggest that the value of any concessions made by the Court's employees can be returned to them if this Court finds that the benefits should not have been funded. This is simplistic as to the retiree health plan and

impossible as to the MERS B-4. Returning to the traditional healthcare plan with a $2.00 drug co-pay would greatly increase healthcare costs (to Appellants' detriment), and restoring the status quo ante would require the Counties to reimburse employees for their increased prescription costs in the interim. "Unscrambling" this egg would create formidable administrative challenges and be impracticable.[62]

The situation as to MERS is legally impossible to unwind. Studier teaches that while a pension benefit can be modified with respect to future years of service, the financial benefits now in place by virtue of the various fund transfers and the Otsego resolution are protected by Const 1963, art 9, §24:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

This provision precludes any adverse impact on an employee's already accrued pension benefit, even increasing the age of eligibility or imposing an annual fee to continue the existing eligibility criteria. Ass'n of Prof'l and Technical Employees v Detroit, 154 Mich App 440, 446-447; 398 NW2d 436 (1986). See also, Tyler v Livonia Schools, 459 Mich 382, 296-397; 590 NW2d 560 (1999). For all their complaints about crediting Court employees' prior years of service, Appellants have never explained how the MERS B-4 benefit could be "unwound" for those prior years of service, for which MERS now holds the assets.[63]

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[62] The capped healthcare fund, approved by resolutions in all three counties, was established and now contains approximately $350,000. The maximum two-person payout per retiree was initially set by the Court, and remains, at a reimbursement of $3,600 annually. The MERS B-4 benefit is also unquestionably in place.

[63] MERS' General Counsel has opined (in response to a 2002 inquiry from the Funding Units) that the Otsego MERS divisions comprised of court employees were duly created by resolution. (389-391b.)

It is particularly significant that the employees who previously participated in the 87th District Court SEP Plan rolled over their individual asset accounts from that plan into MERS. Those assets could not be transferred out of MERS now without creating a taxable event that would unfairly detriment those employees. Additionally, since 2003 several Court employees have retired and have begun receiving benefits at the B-4 level; their benefits are unquestionably vested.

In sum, while the continuation of a B-4 level of benefit (or the institution of an employee contribution) could be a subject of discussion in future years, there can be no return to the pre B-4 status quo ante, as Appellants suggest.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the issues posed by this Court be answered affirmatively for the reasons set forth above. Alternatively, the Court may wish to adopt the rationale of Judge Zahra's partial concurrence, which recognized that the retirement benefits became reasonable and necessary under the "unique circumstances surrounding the merger of courts under the demonstration project imposed upon the Counties." 46th Circuit Trial Court II, supra, 266 Mich App 185 at n 3. But Appellees also respectfully suggest that this Court might reconsider its grant of leave on Issue I (overall funding) and decide that leave was improvidently granted based on Appellants' misrepresentation of the underlying facts. Finally, Appellees request this Court to deny leave to appeal with respect to all other issues held in abeyance as a result of this Court's December 28, 2005 orders.

Respectfully submitted,

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